Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-958

UNITED STATES OF AMERICA, ET AL.,
Petitioners

—v.—

MAX JANIS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED FEBRUARY 3, 1975
CERTIORARI GRANTED JUNE 9, 1975

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—v.—

MAX JANIS

ON WRIT OF CERTIORARI TO THE UNITED STATES
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RELEVANT DOCKET ENTRIES

CIVIL DOCKET
UNITED STATES DISTRICT COURT

70-1383-MML

DATE	PROCEEDINGS
6/23/70	Fld Complt to enjoin collection of Taxes under Arbitrary and Illegal Assessment and for Return of Property. Issd summs—Md JS-5.
7/14/70	Fld summs—retd svd.
8/26/70	Fld stip & ord (EC) extendg time that the deft w/i which to file an ans or otherwise plf to & includg 10/28/70.
10/26/70	Fld Defts U.S.A. note of motn & motn to dismiss plf's complt & memo retable 12/7/70, 9:30 A.M.
11/20/70	Fld plf's oppos to motn to dismiss.
12/7/70	Cnsl pre & argue deft's mot to dismiss & ct ords mot grant w/O prej. Cnsl for deft to prepare form ord & ct states that plf may file an amended compl.
12/9/70	Fld Pltf's FIRST AMENDED COMPLAINT. Fld order dismissing plt's orig cmplt w/o prej. (Ent 12/10/70)
12/29/70	Fld stip & ord (EC) extendg time for deft to & includg 2/18/71, w/i which to answer of otherwise plead.
2/18/71	Fld U.S.A. ANSWER.
2/19/71	Fld & Mld notice setting for Pre Trial Con, 4/26/71, 9:30 A.M.
3/31/71	Fld deft's written interrogs to plft pursuant to rule 33.

DATE	PROCEEDINGS

4/1/71 Fld USA not of mot & mot for leave of Court to amend ans, retable 4/26/71, 9:30 am & affid of Mason C. Lewis.

4/20/71 Fld stip & ord (EC) cont P/T conf retable 6/14/71, at 9:30 am.

4/26/71 Fld stip & ord (EC) permitting deft to amend its ans & to take deft's mot for leave to amend off cal.

4/29/71 Fld U.S.A. Amended ANSWER & counterclaim.

4/30/71 Fld ans of plft, Max Janis, to written interrogs served upon him by deft's pursuant to rule 33(B), F.R.C.P.

5/18/71 Fld plf'ts REPLY to counterclaim.

5/19/71 Fld plft request for admissions & written interrogs.

5/21/71 Fld U.S.A. not of mot retable 6/7/71, at 9:30 AM & mot for ord to compel discovery or, int the alternative, for an ord dismissing pltf's Amended complt & entering judgmt for deft on its counterclaim, & memo.

6/1/71 Fld stip & ord (EC) for contg of hrg on mot to compel discovery retable 9/27/71, at 9:30 AM; Fld stip & ord (EC) for contg of P/T conf retable 10/18/71, at 9:30 AM.

6/10/71 Fld deft's ans to request for admissions & written interrogs.

8/6/71 Fld ord trans to Cal MML for all ?————————?

9/14/71 Fld plft's memo of pts & auths in oppos to mot to compel discovery or, in the alternative, for an ord dismissing plft's amended complt & entering judgmt for deft on its counterclaim.

DATE	PROCEEDINGS

9/21/71 Fld plft not of mot retable 10/4/71, at 9:30 AM, & mot for ord to compel discovery or, in the alternative, for an ord dismissing deft's counterclaim & entering judgmt for plft on his complt, & memo; Fld stip & ord (MML) shortening time for plft to file not retable 10/4/71, at 9:30 AM.

9/24/71 Fld response of U.S.A. to plft's mot for ord to compel discovery or, in the alternative, for an ord dismissing deft's counterclaim & entering judgmt for plft on his complt & memo; Fld reply of United States of America to plft's memo of pts & auths in oppos to mot to compel discovery, etc.

10/4/71 Hearing: Motion by plft to compel discovery Granted. Motion by plft to dismiss defts counterclaim Denied. Motion by deft for an order to compel discovery or in alternative to dismiss Denied. Pre-Trial ordered continued to Dec 13, 1971 at 10 am. Pltf to prepare formal order. (MML)

10/19/71 Fld deft's amended ans to request for admissions & written interrogs.

10/22/71 LODGED proposed ord.

10/26/71 Fld order granting pltf's mot to compel discovery, dnyg pltf's mot for order dismissing deft's cntrclm & entering judgmnt, dnyg deft's mot for ord to compel discovery, etc dnyg deft's mot for ord dismissing pltf's amnd cmplt. (Ent 10/27/71 ntfd prtys)

10/28/71 Fld plft request for admissions & written interrogs.

12/2/71 Fld deft's ans to request for admissions and written interrogs.

12/9/71 Fld stip & ord (MML) retable 1/22/72, 9:30 am for contc of P/T conf.

DATE	PROCEEDINGS
1972	
1/27/72	Fld plft not of mot retable 2/14/72, 9:30 AM, & mot for summy judgmt affid of Herbert D. Sturman, & memo in support thereof; LODGED proposed plft findgs of fact & conclus of law.
2/2/72	Fld stip & ord (MML) for tak P/T procedures off calendar & for contg of hrg on plft's mot for summary judgmt retble 3/20/72, 9:30 AM.
3/10/72	Fld deft's respons to pltf's mot for summy judgmt, affid of Mason C. Lewis, & memo.
3/23/72	Fld stip & ord (MML) for contd of hrg on plft's mot for summy judgmt retable 4/10/72, 10 am; Fld ex parte mot of U.S.A. for substitution of page in deft's response to plft's mot for summy judgmt (MML).
3/27/72	Fld plft's reply memo in support of mot for summy judgmt.
4/10/72	Motion for Summary Judgment by plaintiff denied Court and counsel confer. On motion of counsel. Pre-Trial ordered continued to June 12, 1972 at 10 am (MML).
5/10/72	Fld stip & ord (MML) for contd of P/T conf retable 7/17/72, 10 am.
5/11/72	Fld plft not of tak depos of Morris Nimovitz on 6/29/72 w/service thereon; Fld plft not of tak depos of Leonard Weissman on 6/29/72, w/service thereon; Fld plft not of tak depos of Sergeant M. Briggs on 6/29/72, w/service thereon; Fld plft not of tak depos of Sergeant A. Vincent on 6/29/72, w/service thereon.
5/18/72	Fld prae letter form re Issd (4) depos subp, as to Leonard, Weissman, Briggs, Vincent & Morris Nimovitz.
6/13/72	Fld plf's not of taking depos of Leonard Weissman on 7/10/72, w/service thereon.

DATE	PROCEEDINGS
7/7/72	Fld stip & ord (MML) for contd of P/T conf retable 8/21/72.
7/31/72	Fld deft's not of rkg depo of morris Nimovitz w/service thereon. Fld DEPOSITION of Morris Nimovitz taken on 6/29/72.
8/11/72	Fld deft's not of filing depo of Leonard Weissman: Fld DEPOSITION of Leonard Weissman, taken on 7/13/72.
8/16/72	LODGED plf's proposed PTC ord; Fld plf's memo of contntns of fact & law; Fld defts' USA P/T memo of cntntns of fact & law.
8/21/72	Pre-trial conf had. Crt ords matter cont to 10/10/72, 9:30 am for Crt trial (MML).
8/24/72	Fld pltf's supple memo of contentions of fact & law.
9/11/72	Fld PTC ord (MML).
9/20/72	Fld pltf's not of motn retable 10/10/72 at 9:30 am & motns for (1) Suppression & retrn of Evidence (2) to Quash Assessments (3) to shift Burden of proof.
9/27/72	Fld defts response to plf's mot: 1) for supression & retn of evidence, 2) to quash assessment, & 3) to shift burden of proof.
10/10/72	Fld pltf's spplmntn affdvt & memo of Pts & authors in spprt of mtned for spprssn & rtrn of evdnc to Quash Assmnt, & to Shift Burden of Proof.
10/11/72	Fld stp & ord (MML) for cont of trial date to 11/28/72, 1:30 pm.
*10/10/72	Motion by pltf: For Suppression of evidence; to quash assessment; and to shift burden of proof. Counsel Submit matter to Court on Briefs heretofore filed. Court takes matter under submission. (MML), KH

DATE	PROCEEDINGS

11/22/72 Fld stip & ord (MML) for cont of trial date to 1/16/73, 9:30 am.

12/15/72 Fld pltf's second suppltmtl memo of pts and auth in support of mtns for suppression and return of evidence, to quash assessment, and to shift burden of proof.

12/26/72 Fld defts' response to 2nd suplmntl memo of pts & auths in support of mots for suppression & rtn of evidence, to quash assessment & to shift burden of proof.

1973

1/16/73 Fld stip & ord (MML) for cont of trial date to 2/13/73, 9:30 am. eam.

1/19/73 Fld deft USA's fur response to 2nd suplmntl memo of pts & auths in support of mots for suppression & retn of evidence, to quash assessment & to shift burden of proof.

1/16/73 ENT PROCS: Cnsl for deft pres & mvs ct for cont to 2/13/73 at 9:30 am. Mtn is granted. (MML)

2/13/73 Ent Procs; Court Trial; Mrkd exhbts, argmnt hrd. Ct. finds in favor of plf. Cnsl for plf to prpr papers & ldg w/ct by 2/20/73. (MML)s Fld list of Wnnss & exhbts.

2/21/73 LODGED plf proposed findgs of fact & conclusns of law. LODGED: Proposed Ord.

2/22/73 Fld deft's objections to form of findgs of fact and concld of law.

2/26/73 LODGED pltfs propos findgs of fact and concls of law.

2/27/73 Placed in file prev. LODGED pltfs propos findgs of fact and concls of law not used.

DATE	PROCEEDINGS

2/27/73 Fld fndgs of fact & concl of law; Fld ord suppressing evidence of personal property, etc. seized frm pltf & any & all fruits of the arrest & search. The civil tax assessment md by the IRS in the amount of $89,026.09 property & assets of pltf be quashed. Pltf shall by jdgmt on his complt in the sum of $4,940.00 together with int & deft shall take nothing on their counterclaim & sd counterclaim be dismd w/prej. (Ent 2/27/73) ntfd prtys

3/9/73 Fld USA's notc of mot 7 mot to amend fdngs of fact & conclus of law & for a new trial retrnble 3/26/73, 10 am, memo.

3/14/73 Fld pltf Max Janis's response of pltf to govt's mtn to amend findgs of fact and concls of law and for new trial.

3/28/73 Lodged pltf's proposed ruling on deft's mot for new trial. Lodged pltf's prpos order grantg prelim inj.

3/26/73 ENT PROCS: Hrgng deft's mtn to amnd finds of facts & conclsns of law for a new trial. The mtn is denied. (MML)

4/3/73 Fld rulng on deft's mtn for new trial. The mtn is denied. (MML)

5/25/73 Fld USA's NOTICE OF APPEAL, (w/service thereon) cpys to (MML) and to (RE).

6/4/73 Fld Deft's Designation of record on appeal.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 70-1383-EC

[Filed December 9, 1970]

MAX JANIS, PLAINTIFF

v.

FRANK S. SCHMIDT, District
Director of Internal Revenue, DEFENDANT

AMENDED COMPLAINT FOR REFUND OF TAXES

Plaintiff complains of the defendant as follows:

I

Plaintiff is a citizen of the United States and resides in the County of Los Angeles, in the Central District of California. This Court has jurisdiction and venue of this action for refund of internal revenue taxes paid under Title 26, United States Code, Section 7422, Title 28, United States Code, Sections 1346(a)(1), 1402(a)(1), and the internal revenue laws of the United States.

II

Defendant, Frank S. Schmidt, at the time the taxes referred to herein were collected by him from plaintiff, was the District Director of Internal Revenue for the Los Angeles District of California. Defendant resides in the Central District of California. This Court has jurisdiction of this action for refund of internal revenue taxes paid under Title 26, United States Code, Section 7422, Title 28, United States Code, Section 1340, and the internal revenue laws of the United States. Venue lies in this District under Title 28, United States Code, Section 1391(b).

III

On December 5, 1968, defendant, by and through his agents, illegally, arbitrarily, and erroneously assessed an excise tax deficiency against plaintiff in the sum of $89,026.09 plus interest in the sum of $123.97, and also commenced collection activities pursuant thereto by levying on and seizing $4,940.00, property of the plaintiff.

IV

On June 18, 1969, plaintiff filed with the Internal Revenue Service a claim for refund of $4,940.00, plus interest thereon as provided by law, based upon the grounds and facts that the levy was illegal, erroneous and excessive and the assessment was arbitrary, illegal, erroneous and excessive. Attached hereto as Exhibit A, and incorporated by reference herein, is a true copy of said claim for refund.

V

More than six months have elapsed since the filing of the claim for refund, but no action has been taken thereon.

VI

No portion of the sum of $4,940.00 or interest thereon has been refunded by defendant or the Internal Revenue Service to plaintiff, and no legal offsets or credits exist with respect to those sums.

VII

Defendant owes to plaintiff $4,940.00, together with interest thereon from the date of levy as provided by law, and costs.

WHEREFORE, plaintiff demands judgment against defendant for the sum of $4,940.00, together with interest thereon as provided by law, and costs.

SHERMAN AND STURMAN

By /s/ Ronald S. Morrow
Ronald S. Morrow
Attorneys For Plaintiff

AMENDED ANSWER AND COUNTERCLAIM

(Number and Title Omitted)

(Filed: April 29, 1971)

The United States of America, defendant, in answering the allegations in plaintiff's amended complaint, denies all such allegations which are not admitted, qualified, or otherwise specifically referred to. In further answering the amended complaint, defendant:

I

Admits the allegations contained in paragraph I.

II

Admits the allegations contained in paragraph II.

III

Admits the allegations contained in paragraph III except denies that the assessment and collection were illegal, arbitrary or erroneous.

IV

Admits that a claim for refund was filed by plaintiff on or about June 19, 1969, but denies each and every allegation in the claim for refund not otherwise answered by this pleading.

V

Admits the allegations contained in paragraph V.

VI

Denies present knowledge or information concerning the truth of the allegations contained in paragraph VI.

VII

Denies the allegations contained in paragraph VII.

COUNTERCLAIM

VIII

The Court has jurisdiction of this counterclaim by virtue of 28 U.S.C. Sections 1340 and 1346(c).

IX

This counterclaim is directed by the Attorney General of the United States and is authorized by the Secretary of the Treasury or his delegate, pursuant to Section 7401 of the Internal Revenue Code of 1954.

X

The defendant files this counterclaim pursuant to Rule 13(a), Federal Rules of Civil Procedure.

XI

The plaintiff is now and was at all times pertinent to this action an individual who was a citizen of the United States and of the State of California and a resident within the Central District of California.

XII

As indicated in paragraph III of the amended complaint, defendant, United States of America, on December 5, 1968, entered its assessment against plaintiff covering the taxable period September 14, 1968 through November 30, 1968, in the total amount of $89,150.06, plus interest. The assessment was made pursuant to Section 4401 of the Internal Revenue Code of 1954 on the basis that plaintiff was a person engaged in the business of accepting wagers during the period for which the assessment was made. Of this assessment only $4,940.00 has been paid or credited, thereby leaving an outstanding liability due and owing to the United States of America in the amount of $84,210.06, plus interest.

WHEREFORE, having fully answered each and every allegation contained in plaintiff's amended complaint,

and upon its allegations set forth in its counterclaim, defendant prays that plaintiff's amended complaint be dismissed and that a judgment be entered in defendant's favor in the amount of $84,210.06, plus interest as provided by law, plus costs and such other relief which the Court may deem just and proper.

DATED: March 30, 1971

ROBERT L. MEYER
United States Attorney
CHARLES H. MAGNUSON
Assistant U.S. Attorney
Chief, Tax Division

/s/ Mason C. Lewis
MASON C. LEWIS
Attorneys for United
States of America

PLAINTIFF'S REPLY TO COUNTERCLAIM

(Number and Title Omitted)

(Filed: May 18, 1971)

COMES NOW the plaintiff in response to the counterclaim on file herein and admits, denies and alleges as follows:

I

Plaintiff admits the allegations of paragraph VIII of the counterclaim.

II

Plaintiff does not have present knowledge or information concerning the truth of the allegations contained in paragraph IX of the counterclaim, and on that ground denies each and every allegation thereof.

III

Plaintiff admits the allegations of paragraph X of the counterclaim.

IV

Plaintiff admits the allegations of paragraph XI of the counterclaim.

V

Plaintiff admits the allegations of paragraph XII of the counterclaim to the effect that an assessment was made, but specifically denies the propriety of the assessment and that he is in any way indebted to the defendants pursuant to said assessment. In this connection, plaintiff alleges that said assessment was arbitrary, capricious, erroneous and the product of illegally obtained evidence.

WHEREFORE, plaintiff prays that defendants take nothing by their counterclaim, that said counterclaim be dismissed, that plaintiff recover his costs of suit herein, and that the Court grant such other and further relief as it deems just and proper.

DATED: May 17, 1971.

SHERMAN AND STURMAN

By /s/ Herbert D. Sturman
Herbert D. Sturman
Attorneys for Plaintiff

PRE-TRIAL CONFERENCE ORDER

(Number and Title Omitted)

(Filed: September 11, 1972)

Following pre-trial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, IT IS ORDERED:

I

This is an action for the refund of internal revenue taxes. The plaintiff herein is one Max Janis; the defendants herein are Frank S. Schmidt, District Director of Internal Revenue, and the United States of America, a sovereign body politic. The plaintiff seeks the recovery of $4,940.00, together with interest thereon as provided by law. The defendants have counterclaimed for the recovery of taxes allegedly due and owing from the plaintiff to the defendants in the net sum of $84,210.06, together with interest thereon as provided by law. The pleadings which raise the issues are as follows:

A. Amended Complaint for Refund of Taxes.
B. Amended Answer and Counterclaim.

II

Federal jurisdiction and venue are invoked upon the following grounds:

A. Plaintiff is a citizen of the United States and resides in the County of Los Angeles in the Central District of California.

B. Defendant, Frank S. Schmidt, is, and at all times relevant hereto was, the District Director of Internal Revenue for the Los Angeles District of California.

C. The defendant, United States of America, is a sovereign body politic.

D. The Court has jurisdiction and venue of this action for refund of internal revenue taxes pursuant

to 26 U.S.C. Section 7422, 28 U.S.C. Sections 1346 (a)(1), 1391(b) and 1402(a)(1), and the internal revenue laws of the United States.

E. The Court has jurisdiction of the counterclaim hereof pursuant to 28 U.S.C. Sections 1340 and 1346(c).

III

The following facts are admitted and require no proof:

A. Plaintiff is a citizen of the United States and resides in the County of Los Angeles in the Central District of California.

B. Defendant, Frank S. Schmidt, is, and at all times relevant hereto was, the District Director of Internal Revenue for the Los Angeles District of California.

C. The defendant, United States of America, is a sovereign body politic.

D. On December 5, 1968, defendants by and through their agents, assessed an excise tax deficiency against plaintiff in the sum of $89,026.09, plus interest in the sum of $123.97.

E. The items upon which the defendants based their assessment against plaintiff was originally obtained by officers of the Los Angeles Police Department pursuant to Search Warrant 1878, issued on November 26, 1968, by the Honorable Xenophon F. Lang, Judge of the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. Said search warrant was issued by Judge Lang on the basis of an affidavit in support of said search warrant, executed by one Leonard Weissman, a Los Angeles Police Officer attached to the Administrative Vice Division.

F. The aforementioned search warrant, in turn, was acted upon by the Los Angeles Police Department on November 30, 1968, at which time the plaintiff and one Morris Aaron Levine were arrested and the premises in which the plaintiff and Mr. Levine were found were searched.

G. At the time of the arrests and search, to wit, on November 30, 1968, certain property of the plaintiff and the said Morris Aaron Levine was seized by the Los Angeles police officers. Included within the seized property was cash in the sum of $4,940.00, which such cash constituted the property of the plaintiff. In addition thereto, certain betting markers and other documents were seized.

H. Following the arrests of the plaintiff and Mr. Levine as aforesaid, a prosecution was instituted in the Municipal Court of the Los Angeles Judicial District of the State of California, bearing Case No. A 239 336, and entitled *People of the State of California, Plaintiff*, v. *Max Janis and Morris Aaron Levine, Defendants.* On February 18, 1969, the plaintiff herein and Morris Aaron Levine moved to quash the aforementioned search warrant before the Honorable Xenophon F. Lang, Municipal Court Judge and also the same magistrate who had originally issued said warrant. The motion to quash the search warrant was granted by Judge Lang on the grounds that the affidavit in support thereof failed to set forth the underlying circumstances necessary to enable the issuing magistrate to independently judge the validity and reliability of the informant's information. Judge Lang further ordered that all items seized pursuant to the said search warrant be returned to the plaintiff herein and Morris Aaron Levine, save and except Judge Lang did not order the return of the cash in the sum of $4,940.00, which had been seized by the defendants on December 5, 1968.

I. The defendants predicted their assessment of an excise tax deficiency against plaintiff herein in the sum of $89,026.09, plus interest of $123.97, solely upon items which had been seized by the Los Angeles Police Department pursuant to the aforementioned search warrant and upon conversations had with representatives of the Los Angeles Police Department relating to the contents of the items seized pursuant

to the search warrant and the duration of plaintiff's alleged wagering activities.

J. On December 3, 1968, Leonard Weissman, a Los Angeles Police Department officer, informed Morris Nimovitz, a revenue officer of the Internal Revenue Service, that the plaintiff herein had been arrested for alleged bookmaking activities. Officer Weissman was the same person who had prepared the affidavit in support of the search warrant which had been quashed by Judge Lang on the basis of an insufficient affidavit in support thereof. Mr. Nimovitz proceeded to the Los Angeles Police Department and with the help of Officer Weissman, analyzed certain betting markers and information which had been seized pursuant to the aforementioned search warrant. On the basis of their analysis, the gross volume of bookmaking activities alleged to have been conducted by the plaintiff herein and Morris Aaron Levine was determined for the five days immediately preceding the arrest of the plaintiff herein and Morris Aaron Levine. Officer Weissman further informed Mr. Nimovitz that he had commenced his investigation of the plaintiff herein on September 14, 1968, which continued on an intermittent basis through November 30, 1968, the date of the arrest. On the basis of the information given by Officer Weissman to Mr. Nimovitz, the civil tax assessment was made by taking five days of activities as determined from the items seized pursuant to the aforementioned search warrant and multiplying the daily gross volume times 77 days, to wit, the period of Officer Weissman's intermittent surveillance (September 14, 1968 through November 30, 1968).

K. The sole basis of the computation of the civil tax assessment against the plaintiff herein was, therefore, the items obtained pursuant to the search warrant (five days of receipts and currency in the amount of $4,940.00) and the information furnished to Mr. Nimovitz by Officer Weissman with respect to the duration of plaintiff's alleged wagering activities.

L. The plaintiff has not filed any tax returns with either the Internal Revenue Service or the Franchise Tax Board of the State of California pertaining to his alleged bookmaking activities for the period of September 14, 1968 through November 30, 1968.

IV

The reservations as to the facts recited in Paragraph III above, are as follows:

NONE

V

The following facts, alleged by plaintiff to be true, have not been stipulated to by the parties:

A. Save and except for the intermittent surveillance of plaintiff as aforesaid, the Los Angeles Police Department did not have any information in addition to that which was in the affidavit executed by Officer Weissman in support of the aforementioned search warrant. Accordingly, the search of the premises described in the search warrant was based solely upon the information contained in the affidavit in support of the search warrant; and, in turn, the arrest of the plaintiff herein was based solely upon the evidence obtained from said search in that without such evidence, no probable cause existed for the arrest.

VI

The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary:

NONE.

VII

Assuming this Court determines the legal positions advanced by the plaintiff herein with respect to his Fourth and Fifth Amendment rights adversely to the plaintiff, the following issues of fact and no others, remain to be litigated upon the trial:

A. Whether the plaintiff was engaged in bookmaking activities during the period of September 14, 1968 through November 30, 1968?

B. If the plaintiff was engaged in bookmaking activities during the period of September 14, 1968 through November 30, 1968, what were the extent of these activities, and, in particular, what was the gross volume of said activities?

C. If the plaintiff was engaged in bookmaking activities during the period of September 14, 1968 through November 30, 1968, what is his correct federal tax liability resulting from said bookmaking activities?

VIII

The exhibits to be offered at the trial, which are stipulated by the parties to be admissible without objection, are as follows:

Defendants' Exhibits

A. Certified copy of Certificate of Assessments and Payments, Internal Revenue Form 4340.

Plaintiff's Exhibits

1. Copy of Search Warrant No. 1878 issued by the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, On November 26, 1968.

2. Copy of Affidavit in Support of and Petition for Search Warrant No. 1878 executed by Leonard Weissman on November 26, 1968.

3. Copy of Return to Search Warrant No. 1878.

4. Copy of Reporter's Transcript of hearing on Tuesday, February 18, 1969 in *People of the State of California*, Plaintiff, v. *Max Janis and Morris Aaron Levine, Defendants*, Los Angeles Municipal Court Case No. A-239 336.

5. Defendants' Answers to Request for Admissions and Written Interrogatories.

6. Defendants' Amended Answers to Requests for Admissions and Written Interrogatories.

IX

The following issues of law, and no others, remain to be litigated at trial:

A. Whether the search warrant, under which the items providing the basis for the civil tax assessment in this matter were obtained, was lawfully issued and based upon good and sufficient probable cause?

B. Whether a valid civil tax assessment can be based upon items illegally seized?

C. Whether the plaintiff's testimony concerning his alleged bookmaking activities, in order to support the position that the wagering excise tax assessment was erroneous, would amount to a forfeiture of his constitutional right against self incrimination?

D. Whether the civil tax assessment herein was arbitrary and, as such, whether said assessment is null and void?

E. Whether the plaintiff would satisfy his burden of proof in order to prevail on the complaint and/or counterclaim herein by establishing that the assessment was based upon items illegally seized by the Los Angeles Police Department?

X

The foregoing admissions having been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

DATED: 9/11/72.

/s/ Malcolm M. Lucas
United States District Court Judge

APPROVED AS TO FORM AND CONTENT:

SHERMAN AND STURMAN

By /s/ Herbert D. Sturman
WILLIAM D. KELLER
U.S. Attorney
CHARLES H. MAGNUSON
Asst. U.S. Attorney
Chief, Tax Division
MASON C. LEWIS
Asst. U.S. Attorney

/s/ Mason C. Lewis
MASON C. LEWIS
Attorneys for the United States of America

NOTICE OF MOTIONS AND MOTIONS:

1. FOR SUPPRESSION AND RETURN OF EVIDENCE
2. TO QUASH ASSESSMENT; AND
3. TO SHIFT BURDEN OF PROOF

(Number and Title Omitted)

(Filed: September 21, 1972)

TO THE UNITED STATES ATTORNEY:

YOU WILL PLEASE TAKE NOTICE that on October 10, 1972, at 9:30 A.M., or as soon thereafter as counsel can be heard, in the Courtroom of the Honorable Malcolm M. Lucas, United States District Judge, at 312 N. Spring Street, Los Angeles, California, the plaintiff, Max Janis, will make the following motions:

1. That the items listed below be suppressed as evidence in this proceeding and returned to him.

A. All items of personal property taken from Apartment No. 904 at 1155 N. La Cienega Boulevard, Los Angeles, California, on or about November 30, 1968, by Los Angeles Police Department Officers. Said personal property includes, but is not limited to, the following items: 2 telephones, 4x5 cards (numerous blanks), 3 stapled-group betting markers and pay owe sheets, 1 pack J.K. sports journals, 2 sport journals with figures, 1 pack betting markers, 1 group loose betting markers, 5 blank pads, 5 pens, cash in the sum of $4,940.00, 1 legal tablet with figures, miscellaneous papers with marks from persons, and phone books;

B. All copies of the items set forth in Subparagraph A above which were made and/or utilized by agents and/or officers of the Internal Revenue Service and are currently in the possession of the Internal Revenue Service; and

C. All original items set forth in Subparagraph A above currently in the possession of agents and/or officers of the Internal Revenue Service, which such items include, but are not limited to, cash in the sum of $4,940.00.

2. That the civil tax assessment made by the Internal Revenue Service in connection with this proceeding be quashed on the ground that said assessment is substantially, if not completely, the product of illegally obtained evidence; and

3. That the burden of proof normally attendant upon plaintiffs in a suit for refund of civil taxes be shifted to the defendants herein for the reason that the subject assessment is substantially the product of illegally obtained evidence.

These motions are based upon all of the files and pleadings in this case, the affidavit of Herbert D. Sturman, the exhibits attached hereto, the memorandum of points and authorities filed in conjunction herewith, and such other and further evidence as may be introduced at the hearing on these motions.

DATED: September 19, 1972

SHERMAN AND STURMAN

By /s/ Herbert D. Sturman
HERBERT D. STURMAN
Attorneys for Plaintiff,
Max Janis

DEPOSITION OF MORRIS NIMOVITZ

(Number and Title Omitted)

(Filed: July 31, 1972)

BEVERLY HILLS, CALIFORNIA,
THURSDAY, JUNE 29, 1972

1:05 P.M.

MORRIS NIMOVITZ,

called as a witness, having been duly sworn, testified as follows:

EXAMINATION

BY MR. SHERMAN:

Q Mr. Nimovitz—is that how you pronounce your name?

A Nimovitz.

Q Sir, have you ever had your deposition taken before?

A No.

Q All right. Well, then, let me explain to you a little bit about what this procedure is.

Although we are not sitting in a courtroom, with an American flag, so to speak, these are judicial proceedings, and you're being questioned here in lieu of your being questioned in court.

Do you understand that?

A Yes.

Q Everything that you say here, and the answers that you give, have the same solemnity that they'd have in a courtroom.

Do you understand that?

A Yes.

[5] Q Now, if during the course of this deposition I speak quickly, or if you don't understand something I'm saying, just tell me that you don't understand.

Now, you're being represented here today by counsel, aren't you?

A Yes.

Q Your counsel is the gentleman seated in the room, Mr. Lewis?

A Right.

Q If you want to talk to Mr. Lewis at any time during this deposition, just say so, and we can have a little recess while you talk to Mr. Lewis.

Do you have any questions?

A No.

Q Mr. Nimovitz, what is your occupation or employment?

A I'm a revenue officer with the Internal Revenue Service.

Q How long have you been so employed?

A Eleven years, approximately.

Q Do you work here in Los Angeles, California?

A Yes, I do.

MR. SHERMAN: Counsel, I'm going to show the witness Exhibit A attached to the opposition—to the defendant's response to plaintiff's Motion for Summary Judgment. I'll show it to you, Counsel.

MR. LEWIS: Okay.

[6] BY MR. SHERMAN:

Q Mr. Nimovitz, I'd like to hand you this exhibit.

You're now looking at Exhibit A attached to the defendant's response to the plaintiff's Motion for Summary Judgment.

Now, did you prepare the original of that?

A No.

Q You did not prepare it.

Do you know who did prepare it?

A I can venture a guess.

Q All right.

A It was prepared by the Special Procedures Section.

Q Okay.

Did you give the Special Procedures Section the figures upon which to prepare that?

A No.

Q Now, you are aware, are you not—may I have the document back, please.

You are aware, are you not—strike that.

Do you know Mr. Max Janis?

A Yes.

Q What is your relationship to Mr. Janis?

A He is a—what we call a taxpayer against when a wagering tax was assessed as a result of my recommendation.

Q I notice on here, if I might share this with [7] you for just a moment—

A Sure.

Q I notice on here that you have an assessment of $89,026.09, with interest of $123.97. Then you have some credits, and there is a final balance of $84,053.06.

A That's correct.

Q Now, were the figures that you recommended—were these the figures?

A I recommended the figure of $89,150.06.

Q And I take it that to get from $89,150.06 to $84,-053.06 there was a deduction made of $5,097?

A This appears to be a credit for a payment received to the account in this amount.

Q All right.

Now I'm going to tear Exhibit A off our copy of the response, and I'd like to have it marked as Exhibit A in this deposition proceeding, Counsel.

MR. LEWIS: No objection.

BY MR. SHERMAN:

Q Now handing you the document again, Mr. Nimovitz, which has been marked Exhibit A in this deposition proceeding, what relationship did you have to having the taxpayer assessed tax in the amount of $89,-150.06?

A As a revenue officer charged with the duty of recommending jeopardy assessments, I made this recommendation, and the assessment was made as a result of my recommendation.

Q May I inquire, sir, to whom did you make this [8] recommendation?

A I made this recommendation to the District Director of the Los Angeles District.

Q What is his name?

A His name—the present District Director is Mr. Frank Schmidt. And I believe he was the District Director at that time, also.

Q Did you make your recommendation directly to Mr. Schmidt or to somebody working for Mr. Schmidt?

A I made the recommendation on a form which requires a number of intermediate approvals and ends up with Mr. Schmidt's approval or signature.

Q Did Mr. Schmidt approve your precise recommendation?

A As far as I recall, it was—Mr. Schmidt was not active—he was not the District Director at the time in the Federal Building. So, it was his designee, or the Acting District Director.

Q Well, whatever person approved it—

A Yes.

Q —on behalf of Mr. Schmidt—

A It was the District Director, or the Acting District Director that affixed his signature to the recommendation for jeopardy assessment.

Q And that is how the jeopardy assessment was made?

A That is right, sir.

Q Are the figures in the jeopardy assessment, [9] that is, the assessment against the taxpayer, the figures that you recommended?

A To the best of my recollection, these are the figures I recommended, yes.

Q All right.

Now, Mr. Nimovitz, would you state upon what fact you based your recommendation.

A Based these—this recommendation on the amount of handle of wagering—wagerings that were reported to me by the Los Angeles Police Department Vice Squad.

Q Now, did you say—and I may have been a little mixed up about what you said, sir.

Did you say that you based your recommendation upon the "amount of handle of wagerings" that were reported

to you by the Los Angeles Police Department Vice Squad?

Did you say the word "handle"? That's what confused me.

A I want to qualify that.

Q Yes.

A I received figures of wagerings that Mr. Janis and Mr. Levine were involved in as bookmakers for one week, and I believe it was the week ending—let's see. November—November the 30th—I'm not sure about the—it was one week including—ending on Saturday. Okay.

I also received information that Mr. Janis was known to have been engaged in bookmaking for a period approximately three months prior to the last date, which was some time in November, that is, the date of arrest. [10] Q All right.

Now, in other words, you used the word "handle," h-a-n-d-l-e.

A By "handle," I mean the volume of business of bets taken by a bookmaker.

Q Now, in other words, sir, I think you mentioned three things—and if I'm wrong, just correct me.

The first thing was you said you received the amount of handle of wagerings reported to you by the Los Angeles Police Department Vice Squad?

A Um-hum.

Q You said you received figures of wagerings from Janis and Levine for one week ending on the Saturday that he was arrested?

A That is correct, or—

Q And you said you also received information that Janis was known to have engaged in bookmaking prior to the date of arrest, for three months?

A Approximately three months.

Q Now, who was it that told you the amount of business that Janis and Levine were doing for one week preceding their arrest?

A I believe it was Officer Weissman of the Vice Squad.

Q Was it anyone else?

A Might have been Sergeant Safford.

Q And did he just give you figures, or did he show you figures?

[11] A I think originally I received a telephonic report in which he gave gross figures of approximately, say, $70,000 for the week.

Q Whom did you receive this telephonic report from?

A It was either Officer Weissman or Sergeant Safford.

Q Did you make any notes of that?

A Yes.

Q Do you have records of that?

A We—we may have some records if the file is still available, yes.

Q I see.

You don't have those records with you?

A No, I don't.

Q Was that the only information that you received?

A No. I believe that following routine procedure in cases of this kind, I visited the Parker Center Vice Squad office and looked at the evidence seized at the time of the arrests. That included markers and owe sheets. And this includes specific figures for the Saturday preceding the arrest, and exact figures for the entire week.

And at that time I was told, also, that the surveillance of Mr. Janis and Mr. Levine went back as far as September the 14th, 1968.

Q When you went over to Parker Center, do you remember what you looked at specifically?

[12] A No, I don't.

Q Were you told where these items had been obtained that you looked at?

A They were—I was told they had been obtained at the site of the arrests.

Q You mean at Mr. Janis'—

A Mr. Janis' and Mr. Levine's apartments.

Q At one apartment?

A I don't recall if it was one apartment or two apartments. I believe there were two separate searches and two sets of records were secured.

I don't recall exactly, but I believe that was the case.

Q But you can't at this time recall whether what you saw was from Mr. Janis' apartment or whether it was from Mr. Levine's apartment; is that right?

A I recall that one set was secured from a La Cienega Boulevard address, which I see here it's 1155 North La Cienega Boulevard.

Q And you don't know who lived there; Janis or Levine or both of them?

A I think Mr. Levine lived there, because subsequent to my gettting an assessment of this wagering tax, I went to deliver the Notice of Demand for the tax, and I delivered one Notice to this address, which turned out to be Mr. Levine's address, and another one to an address on North Fuller Avenue, which was Mr. Janis' address.

Q Now, Mr. Nimovitz, did you make an independent [13] computation from the records that you saw at Parker Center in order to determine the amount of the assessment reflected in Exhibit A?

A No, I didn't.

Q Well, how did you determine the amount of the assessment in Exhibit A?

A The amount was reported to me as a total for the Saturday and the week preceding, from the records that I was looking at.

Q Well, did you—

A By the—by the arresting officers.

Q And you don't remember which arresting officers?

A I believe it was Officer Weissman.

Q Well, in other words, then, you got your figure from Officer Weissman, and not from any independent investigation of the records that you saw; is that correct?

A I was looking at the records, but I am not that versed in interpreting the codes used by bookmakers; so, it was with the explanations and the assistance of the officers that we arrived at the totals.

Q In other words, you took the officer's word for what the betting volume was?

A That is right.

Q And you couldn't verify the correctness or incorrectness of what the officer said, from your examination of the records?

A I verified after the—I verified the total [14] number of markers and the totals from the markers and the owe sheets, but as to how they were translated and the codes used on those original records, I would not say that I obtained them directly from this source.

Q In other words, would it be a fair statement to say that the officers told you what the weekly volume was, and you accepted their statements, after ascertaining from the records that there was, in fact, gambling activity?

A No.

Q Well, then—

A It wouldn't be correct.

Q Well, what would be correct?

A It would be correct to say that the officers showed me the markers. They explained what each marker translated in dollars represented, and that I totaled up those figures from the individuals and arrived at the total that I used in the assessment.

Q Is that in your working papers?

A No. Just the totals.

Q If I—

A Just the totals.

Q In other words, there would be no way for you to explain to me, by looking at your own working papers, how you arrived at the figures on Exhibit?

A No way I could explain to you, no.

Q What you had was one week's gambling activity, right?

A That is right.

[15] Q And you, through Officer Weissman's interpretation and guidance, determined that the volume was $70,000?

A It was a little less than—approximately $70,000.

Q Then, how did you get from that to the amount on Exhibit A?

A I believe that I prorated the total by the number of days in the period of the actual evidence, came to a daily amount—daily average—and I extrapolated that figure, going back to the first date that they were known to have been engaged in bookmaking.

Q Now, what, precisely, did the officers tell you about their surveillance of Mr. Janis and/or Mr. Levine which caused you to believe that they were, in fact, engaged in bookmaking activities for three months prior to the time of their arrest?

A They told me that Mr. Janis went—I'm sorry. They went to work on the Janis case beginning September 14, 1968. And I don't recall the exact details of the intermediate period since September 14th, except that there have been a number of instances where evidence of bookmaking activity came to their attention.

Q Did they tell you what the evidence of bookmaking activity was?

A At that time I don't think so.

Q At any time prior to your making or recommending the assessment which resulted in Exhibit A, did you determine what their evidence was of bookmaking activity [16] during the three months, approximately, prior to the arrest?

A I believe it could be generally referred to as surveillance of vice officers in bookmaking cases.

Q Well, what I'm asking you—

A Yes.

Q —is what you were told, if you can remember the words.

A I don't recall what I was told.

Q Well—

A Generally, it's in answer to our routine questioning of the vice officers, and you usually ask them, "Have they been under surveillance by you?" And, "If so, for how long?" And, "Do you have specific dates and instances?"

Q In other words, then, what the vice officers told you is that they had Janis and Levine under surveillance for three months, and that Janis and Levine were engaging in bookmaking activities during this period?

A That is right.

Q Did they tell you anything more specific than that?

A They probably did, but I don't recall any of the specifics.

Q Well, is there someplace that you could go to refresh your recollection?

A Well, I have had a number of wagering assessments since that time, but it may be that there were some markers found in a trash can, I believe—in the back yard [17] of one of the residences—but I—I am not particularly sure about this.

MR. LEWIS: If you're not sure, just so answer.

BY MR. SHERMAN:

Q Well, now, do you think that you were told by anyone that there were markers found in a trash can?

A I don't recall this particular situation.

Q Well, in other words, then, you have no specifics that you can recall at this time about the gambling activities that Janis and Levine were allegedly engaged in, with the exception of the markers that were found at the time of their arrest?

A No specifics.

Q Is there anyplace that you could go to locate those specifics?

A Not to my knowledge.

Q Do you feel that you made your assessment based on the fact that the officers told you that Levine and Janis were engaged in bookmaking for three months prior to the time of their arrest and nothing more?

When I say, "nothing more," I mean in addition to the markers that were found in their apartment, or the markers that you looked at.

A I believe they had specific information. I did not have the specific information at that time.

Q And they didn't give it to you as a basis for an assessment?

A No, they did not give it to me.

[18] MR. SHERMAN: Would you excuse us for just a minute, Mason.

(Recess taken.)

(The document referred to, entitled "Certificate of Assessment and Payments," was marked as Plaintiff's Exhibit A for identification by the Notary Public and attached to the deposition.)

MR. SHERMAN: Can we go back on the record.

Q Mr. Nimovitz, would it be a correct statement to say that the assessment in Exhibit A would not have been made, except for the markers that you examined in Parker Center, which you previously described, and the explanation of those markers given you by the Los Angeles Police Department Vice Officers?

A And the period of surveillance reported to me by the police.

Q Did you have any information furnished to you independently of the police—the vice officers that you mentioned—and the markers, which caused you to make this assessment?

A No.

Q In other words, I'm saying there were no informants that called you up and said, "Look, Janis and Levine are engaging in bookmaking activities of so much money"?

A That is correct. There were no other sources of information.

[19] Q Can you recall, sir, in relationship to the date on Exhibit A, when you went to Parker Center?

A It was between December the 3rd and December the 5th. I'm pretty sure I went there on December the 5th.

Q Of what year?

A The original—of 1968. And the original report was received December the 3rd, 1968, by telephone.

Q I just want to get this thing locked down in my mind.

You were first called and told by officers, whose names you are not sure of, but who you think might have been Weissman or Stafford—is that right?

A Yes.

Q —that there was an arrest of a man named Janis and a man named Levine; that they had confiscated certain monies and certain betting materials?

A That is right.

Q Now, I take it that you went over there to Parker Center for the purpose of making an assessment and seizing the monies that they had in their possession?

A Yes.

Q When you got there—this was routine, wasn't it —your going over there?

A That is right.

Q And this is something that you do in the ordinary course of business?

A Yes.

Q And nothing that was told to you in that [20] telephone conversation by itself could have caused you to make a recommendation for an assessment, could it?

A I could have, yes, if I did not have the opportunity to personally inspect the markers or the evidence.

Q But, in other words, the basis for your recommendation, Mr. Nimovitz, was your examination of those markers and an interpretation of what those markers stood for, by Los Angeles Police Department officers, in addition to their statement about prior surveillance?

A Yes.

Q Did you understand that last question?

A Well, may I restate it?

Q Yes, sir.

A The basis of my assessment was the report by the police that they had arrested two bookmakers, and they found evidence of bookmaking, and that they had figures of the amount of bets taken by the two bookmakers, and the markers and any other evidence was simply a further documentation of my assessment.

I could have made the assessment without personally inspecting those markers or the owe sheets.

Q Just based on what the officers told you?

A That is right, sir.

Q Now, you mentioned there were figures that you considered?

Now, the figures that you considered were in the markers that you were shown at Parker Center?

[21] A That is right.

Q There were no other figures that you were shown, were there, sir?

Were you shown any other figures other than those in the exhibits at Parker Center?

A No other figures.

Q And the prior three months that these people were kept under surveillance, there were no figures given you for activity during these periods?

A No, sir, no figures.

Q And you cannot recall at this time, can you, any specific description of the bookmaking activity that Janis and Levine were allegedly engaged in?

A Except for the fact that they were engaged in bookmaking.

Q Just that statement by the Los Angeles Police Department.

So, what you did, then, was you took the figures that you had on the markers, and you just concluded that they had been doing this business for three months —for the prior three months, approximately—and you made the recommendation on the assessment?

A That is right, sir.

Q And that recommendation was accepted and is reflected in Exhibit A?

A That is right.

MR. SHERMAN: I don't think I have any further questions, Counsel, if you'd like to inquire.

[22] MR. LEWIS: No questions.

MR. SHERMAN: Do you want to stipulate this can be signed in front of any notary?

MR. LEWIS: Sure.

MR. SHERMAN: And we will send you the original for Mr. Nimovitz.

MR. LEWIS: Yes.

(A discussion was held off the record.)

MR. SHERMAN: I'd like the record to reflect that counsel are, after having had a conversation—I think we can enter into some stipulation.

May it be stipulated that all of the materials seen by Mr. Nimovitz at Parker Center, that he testified about in the preceding deposition, were obtained as a result of one search at—

MR. WEBB: You have two addresses here.

MR. LEWIS: Off the record for a second.

(A discussion was held off the record.)

MR. SHERMAN: —one search at the taxpayer's residence, made pursuant to the warrant, which was an exhibit in the plaintiff's Motion for Summary Judgment?

MR. LEWIS: So stipulated.

(A discussion was held off the record.)

MR. SHERMAN: Let's go back on the record.

Mr. Lewis, I would like to thank you for being here today. I feel blessed by having so charming a man as yourself visit me.

MR. LEWIS: It's always a pleasure coming down to [23] Beverly Hills. Thank you.

MR. SHERMAN: Thank you.

(A discussion was held off the record.)

MR. SHERMAN: May it be stipulated that the assessment described in Exhibit A was, in fact, based upon the recommendation of Mr. Nimovitz, as he had earlier surmised?

MR. LEWIS: So stipulated.

MR. SHERMAN: Thank you.

Witness

DEPOSITION OF LEONARD WEISSMAN

(Number and Title Omitted)

(Filed: August 11, 1972)

[4] LEONARD WEISSMAN,

called as a witness, having been first duly sworn, testified as follows:

EXAMINATION

BY MR. SHERMAN:

Q Officer Weissman, you had occasion, did you not, to arrest one Max Janis—

A Yes.

Q —in 196—

A '8.

Q —in 1968, in November, about?

A Yes.

Q And did you effect that arrest by entering his premises?

A Yes.

Q Where were those premises; do you recall?

A They weren't his own premises. They were on the premises of Morrie Levine at 11155 North La Cienega. I think the apartment was 904.

Q Incidentally, you have testified many times in court, haven't you.

A Yes, sir.

Q And you understand that this is just a legal proceeding conducted outside of a courtroom?

[5] A Yes, sir.

Q You understand all of the ramifications?

A Yes, sir.

Q When you went into that apartment, did you enter pursuant to a search warrant?

A Yes, sir.

MR. SHERMAN: May it be stipulated, Counsel, that the search warrant that the officer is referring to is the one which is the subject matter of our case?

MR. LEWIS: Yes.

MR. SHERMAN: And may it be stipulated that this is the officer who affixed his signature to the affidavit in that warrant?

MR. LEWIS: Yes.

BY MR. SHERMAN:

Q Mr. Weissman, are you familiar with that affidavit, or would you like to look at it again?

A I've looked at it.

Q Recently?

A Yes.

Q The reason that you went into the apartment was that you did have this search warrant; is that correct?

A Yes.

Q When you entered the apartment, did you comply with Section 814 of the Penal Code—of the California Penal Code?

A Yes. We knocked at the door, and his—Mrs. Levine, I believe it was that opened the door—and [6] we told her we were—she started to close the door; it was on a safety chain. And Sergeant Vincent forced the door, and we both entered at that time.

Q What did you say when you got to the door; do you recall?

A I believe it was—I remember the words, but I'm trying to remember who was it that said it. It was either he or I that said we were police officers; we had a search warrant. I believe I said it.

Q In other words, you said, "I'm a police officer"?

A "Police officers. I have a search warrant. Police officer, City of Los Angeles," or words to that effect. I don't remember the exact words verbatim.

Q Did you ask if you could come in, or did you demand entrance?

A We demanded entrance.

Q Now, then, I take it you forced the door open?

A Yes; from the chain.

Q When you got inside, were you in the living room of the apartment?

A Yes. I think we went through the living room, because there was a double door to the apartment. The second door opened into the kitchen.

Yes, I believe it was the living room, best I can recall.

Q Where did you find Mr. Janis?

A There's a living room area, and it was against [7] the—because you came in the door; there was a wall to the left. The furthest wall to the left there was a table and two chairs facing it. Mr. Janis was on one side, Mr. Levine on the other, and the items that we recovered were on the table with two telephones between them.

Q And you recovered certain items from that table; is that correct?

A Yes, sir.

Q Then I take it that you arrested the defendants and took the papers into your possession?

A Yes.

Q That was done pursuant to this warrant that we have discussed; is that correct?

A Yes.

Q All right.

Now, Officer, did you take the papers downtown and analyze them?

A You mean for handwriting?

Q No. Just to see what, you know, they revealed.

A Oh, yes.

Q To examine their contents.

A Yes, we took them.

Q Did you have occasion shortly thereafter to speak to Mr. Nimovitz from the Internal Revenue Service?

A Yes, sir.

Q What happened; did you call him or did he call you?

A I called him, sir.

[8] Q Can you tell us what the conversation was—
A Yes.
Q —between you and him.
A I can tell you basically what it was.
Q Please.
A It's been too long. I just called and told him that we had made a bookmaking arrest; that it was taken on a search warrant; and that at the location we had recovered approximately five thousand some odd dollars in cash.

I told him that we had tabulated the markers or records that we had found. I told him what they totaled out, and I asked him if Internal Revenue was interested in this type of a case, and he said yes.

And eventually we got together on it. They came over to our office, I believe it was.

Q Now, Sergeant Weissman, is it police department policy to call the Internal Revenue Service when you have taken a substantial sum of cash related to a bookmaking arrest?

A I don't think that there's policy either way. I just—I did it as a matter of—I wouldn't say it was policy. I did it as a matter of police procedure.

In other words, here's a person that was involved in a crime that had this kind of money, and I thought of Internal Revenue.

Q Do you do that on a regular basis?

A I don't do it on what I would consider a [9] small-size book, but I considered this one a major-size book. So, I, therefore, did it.

Q Would you do that with every major-size book that you run across with a substantial amount of cash?

A I probably would.

Q To the best of your knowledge, is this the policy of your brother officers, as well?

A I know that it has been done by officers in administrative vice. I don't know if they all have done it—I don't think that they all have done it, but I don't know.

Q Mr. Nimovitz subsequently came over to talk to you?

A Yes, sir, I believe—yes, he came to our office.

Q And you showed him certain materials?

A Yes. What we had in evidence, yes.

Q And the materials you showed Mr. Nimovitz were the materials that you had taken from the apartment where Janis and Levine were arrested?

A Yes, sir.

Q Did you go over with Mr.—with the Internal Revenue agent—the documents that you had taken from the Janis apartment?

A Did I go over?

Q Well, did you translate them for him? Did you tell him what they meant?

A Yes.

[10] Q And did you go over any documentation with him that wasn't taken from the apartment?

A Not that I can recall.

Q In other words, if he made an assessment based on what he saw in your presence at the police building, it could have only been what you took from the Janis-Levine apartment?

A No. If he made an assessment—are you talking about money or time, now?

Q Money, sir.

A Oh, yeah; yes.

Q Let's talk about time.

What else did you tell him about Janis and Levine?

A At that time, nothing. There was a later conversation by telephone. It was a few days in between that elapsed. He called me, and I missed him—and I called him and missed out, and finally we got together telephonically, and he asked how long the investigation had taken, how long that I was actively—how long was I actively involved in the investigation of Max Janis and Morrie Levine.

I told him I didn't know exactly. I gave him an approximate time, told him if he'd like, I'd look up as many records as I could find and give him as close as I could.

He asked if I would, and I looked up some of my old logs and intelligence notes, things like that, and [11] as far back as I could actually document in writing without trusting strictly to my memory. I told him how long it was, and he computed the days on his own, and whatever appeared that I didn't know about.

Q Well, now, as I understand it, the computation was something to the effect that Janis and Levine had been engaged in bookmaking activities for a period of some three months prior to the arrest.

Does that sound right to you?

MR. LEWIS: Seventy-seven days.

BY MR. SHERMAN:

Q Seventy-seven days.

A The way I think that Mr. Nimovitz got that is when I wrote the affidavit, the best I can recall, Max Janis and Morrie Levine were under investigation, and as the investigation proceeded, it's not unusual for me to pull off for three or four days or a week to go on something else and come back to it.

And then at a later time in the investigation when I received information from the informant with definite phone numbers regarding Max and Morrie, it continued from there on.

The dates that I gave Mr. Nimovitz dated back on my daily logs to when I initially started working on Max and Morrie. That probably is where he got the 77 days from.

He wanted to know how long I was actively involved in investigating the two men.

[12] Q But you didn't have these men under surveillance for that 77-day period, did you?

A Intermittently, yes. In other words, I didn't work on them each and every day. I might have worked for two or three days; I might have been off for two, three. four days, a week or so, and I would have gone back on them, because it was a continuing investigation that I was working on.

But the definite and specific facts, such as when the informant gave me the phone number and said, "This

is the number that they're using right now; here's where I'm talking to him at," et cetera, whatever was testified to, that came at a later time, but that was—that was. in other words, more of the meat toward the affidavit.

But the investigation still was taking place back here. I just didn't have enough information for the warrant at that time.

Q You had no personal way, did you, to estimate the amount of bookmaking that they were doing, that is, without seeing the documents that you got in their apartment?

A You mean prior to serving the warrant?

Q Right.

A No, sir, I had no idea.

Q So, it would be fair to say, then, during the preceding period that you had no knowledge that they were working on a given day, or how much business they were doing on a given day?

A I know that the informant told me they were [13] doing good, and I know the informant told me they were doing sports and horses. Anytime you're talking about sports, you're talking in a sizeable amount of money. If you combine it with horses, you have additional.

But as far as me telling you they were doing a hundred dollars a day or $10,000 a day, I didn't know that prior. I don't think there's any way I could have.

MR. SHERMAN: Would you excuse us for just a minute, please.

(Recess taken.)

(A discussion was held off the record.)

BY MR. SHERMAN:

Q Sergeant Weissman, the only documentation that you showed Mr. Nimovitz was what you had taken from Max Janis' apartment, right?

A Yes. There was a box of cards and whatever papers and miscellaneous things that we had taken, and I left it to his discretion to do whatever he felt

he was going to do, because I didn't know what he was looking for.

Q What I'm trying to get at is you didn't show him any documentation other than what you took from the Janis-Levine apartment that day?

A No, not that I can recall.

Q When I say "that day," of course, I mean the day of the arrest.

A Yes, that's all. I don't know what else you are referring to. That is why I'm having a hard time answering.

[14] As far as I know, whatever was taken in evidence was shown to Mr. Nimovitz, and that is all that was shown to him.

Q Now, Officer, on the date that you arrested him—which I think we have concluded was sometime in November in 1968—

A Yes; yes.

Q —did you have any information in addition to what is in your affidavit?

A Not that I can think of, no.

MR. SHERMAN: I think that's all.

Mason, do you have any questions?

MR. LEWIS: No, not at this time.

MR. SHERMAN: Can we stipulate this can be signed in front of any notary?

MR. LEWIS: Yes, sure.

Witness

REPORTER'S TRANSCRIPT OF PROCEEDINGS

(Number and Title Omitted)

(Filed: February 13, 1973)

LOS ANGELES, CALIFORNIA,
TUESDAY, FEBRUARY 13, 1973; 9:30 A.M.

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[3] THE CLERK: Item 2 on this morning's calendar, case 70-1383, Max Janis v. the United States, for Court trial.

MR. SHERMAN: Richard Sherman for Mr. Janis. We are ready, your Honor.

MR. LEWIS: Good morning, your Honor. Mason Lewis for the United States. We are ready.

THE COURT: Good morning, gentlemen.

I have some preliminary observations in the findings and determinations, gentlemen. I am relucantly holding that the affidavit supporting the search warrant is insufficient under the Spinelli and Aguilar doctrines.

We therefore, I believe, are faced with the issue of whether or not the previously determined evidence, which is at least in part the basis for the Government's position, may be utilized in a civil proceeding, to wit, this proceeding.

The Court has thought at great length about this matter and feels, again reluctantly, that the rationale of the Suarez case is controlling in this matter and, utilizing that particular rationale, would hold that whatever evidence was unlawfully obtained in the criminal [4] procedures is not admissible in this procedure.

Now, Mr. Lewis, what, if anything, does that do to the Government's case? I gather from reading your various briefs filed that there may be other evidence which the Government contends—well, first of all, the Government, I appreciate, does not agree with the Court's position as to the inadmissibility of this evidence in this case, but assuming that decision, is there evidence which

the Government contends is nevertheless admissible which is not the subject of previous illegal search?

MR. LEWIS: Yes, your Honor, but I would ask the Court first if we are clear on the fact that the Government does not intend to offer as evidence any of the materials illegally seized.

THE COURT: Well, certainly the record is now clear that you are not going to offer them, because they have been excluded. I gather that the Government's position is that based upon conversations at least with the arresting officers, and perhaps others, that the Government's case is based on those conversations. I believe Revenue Officer Nimovitz had certain conversations with police officers, perhaps Officer Weissman and others, and based the assessment in substance on those conversations?

MR. LEWIS: Yes, your Honor, that's correct. I would beg the Court's indulgence for a minute to back up. [5] The Court has ruled that the affidavit supporting the warrant is insufficient, which would make the search and seizure illegal.

THE COURT: Yes. This has previously been determined by a Municipal Court judge. I don't view this Court as being bound by that determination—nor did they in the Suarez case—and have re-examined the affidavit.

MR. LEWIS: All right. I understand that, your Honor. Of course, we must point out that the Suarez case was a Tax Court decision.

Well, let me just preface this a little bit. What we have here in this court that the Government was intending to offer as evidence, as indicated by the pre-trial order, is the Certificate of Assessments and Payment. This is the official document issued by the Internal Revenue Service indicating that an assessment has actually been made against the taxpayer.

All right. In the Suarez case the question of whether an assessment was valid or not could not have been decided, because Tax Court procedures provide simply that a Notice of Deficiency, an administrative procedure by the Internal Revenue Service, is the thing that is to be re-determined. An assessment is not yet made.

So there is one crucial distinction that should be appreciated between [6] Tax Court actions and actions where assessments have already been made and we are in the district courts.

As far as the Suarez decision was concerned, I think the concurring opinion explained what exactly the effect of the Court's discussion was, and it pointed out that we do not even hold that the Notice of Deficiency is invalid, because to do so, as the opinion stated, would mean that we simply no longer have any jurisdiction to consider the matter, and that, of course, did not occur in that case.

But let's go a little further. We are in the district court now. We have a case which is a refund suit. It's a run-of-the-mill refund suit, the Government thinks. The law is so well established in refund suits before the district court, in that the taxpayer, or the plaintiff suing for the refund, has the burden of proof to come forward and establish his correct tax liability, irrespective of what the Government's assessments may have been. Judge Ferguson made quite clear note of this particular rule in cited cases in the Ginsberg case in this court in 1969, and we have quoted that case specifically in our pretrial memorandum.

So I use this as a preface to explain that we really have not yet reached what the underlying basis for the assessment is, because so far the taxpayer has come forth with nothing to independently establish his own tax [7] liability. It seems to me that until that is done, the Government is not in any position or required to establish the basis for its assessments, as it were, a rebuttal of what the taxpayer is now giving to this Court in support of his burden of proof.

So to answer the Court's question, we do have information that was given to the revenue officer in this case that was secured by the revenue officer in some manner other than him looking at the materials that were seized. We do have that. But this, of course, as you stated, your Honor, was from certain conversations, as I pointed out earlier, with police officers.

But we simply reiterate here, your Honor, that it would seem that we really aren't ripe for that sort of evidence yet, even though the Government has gone to pains to put this together for the Court's information.

THE COURT: Well, I gather, and I assume that the record reflects, of course, the contents of the pretrial conference order, and "I" of that order seems to indicate that the Government has predicated their assessment of an excise-tax deficiency against the plaintiff in the particular sum—in this case it was some $89,000 plus interest. I'm now reading from the pretrial conference order, page 4, line 14—"solely upon items which had been seized by the Los Angeles Police Department pursuant [8] to the aforementioned search warrant and upon conversations had with representatives of the Los Angeles Police Department relating to the contents of the items seized pursuant to the search warrant and the duration of plaintiff's alleged wagering activities."

Now, perhaps there is some ambiguity in that, but item K on page 5, beginning at line 15, reads, "The sole basis of the computation of the civil tax assessment against the plaintiff herein was, therefore, the items obtained pursuant to the search warrant (5 days of receipts and currency in the amount of $4,940) and the information furnished to Mr. Nimovitz by Officer Weissman with respect to the duration of plaintiff's alleged wagering activities."

Clarify for me whether or not the information submitted by Officer Weissman with respect to the duration of plaintiff's alleged wagering activities was based upon, and solely based upon, an examination of the various items obtained through the utilization of the search warrant.

MR. LEWIS: All right. Officer Weissman's information concerning the duration was based upon informers' advice to Mr. Weissman for the 77-day period that we refer to in the pretrial order. I think that answers your question. Of course, the other duration was the 6 days of betting markers which Officer Weissman related to Mr. Nimovitz as a [9] basis for the gut computation of the assessment itself.

THE COURT: So, in essence, Mr. Weissman had in his possession from the search warrant betting markers which indicated a 6-day activity or 5-day activity, whatever it was—it was 5 days, was it not? 5 days' receipts in currency. —and from that he extrapolated over the period of Officer Weissman's what is termed "intermittent surveillance" from September the 14th, '68 through November the 30th, '68, to come up with the $89,000 figure?

MR. LEWIS: That basically is the mechanics of it, yes, your Honor. And when we say, "the sole basis of the computation," we hasten to explain that Officer Nimovitz received the information concerning the 6 days, concerning the $69,000 that the 6 days total to, and the—well, let's stop there. From Officer Weissman initially, during a telephone conversation, before Officer Nimovitz had the opportunity to actually go down and look at the materials. So of course Officer Weissman had no way of knowing what the markers would show or what the volume was until he saw the material itself. So in this respect the information does eventually filter down solely to the betting markers with respect to the amounts that Max Janis has taken.

THE COURT: Yes. I gather that the surveillance in and of itself, and if there has been information submitted [10] by informants, is not the basis for this assessment. In other words, does the Government contend that the surveillance alone, for example, is sufficient to have been a ground or a basis for the assessment?

MR. LEWIS: No, I don't think so alone. I think the 77 days related by Weissman to Nimovitz, though, came essentially from an informant who was saying something to the effect that Max Janis was operating the book from September 14th, and he's doing it now, and then the surveillance simply confirmed that Max Janis was in fact doing certain things which would coincide with what the informer told him, you see. So it is important to note that the assessment in this case was based upon information given to the Internal Revenue Service by a police officer which he received from

an informant. That is the duration of the assessment. That's an essential part of the assessment.

THE COURT: Yes. But at least at the moment, any finding I would make would be that that—I am not saying that would be immaterial. Of course it is an important aspect. But it would be clearly insufficient to be the basis of any assessment if we stop there. The kernel or the nut of the assessment here does not appear to be the betting markers over the 5-day period, from which, then, from that core or that essential piece of information, you [11] then can extrapolate to the 77-day period. Without the—

MR. LEWIS: No question about that, your Honor. It is important to note, of course, that Mr. Nimovitz of the Internal Revenue Service did receive this information without actually looking at or handling the betting markers themselves.

THE COURT: Let's see if I understand you, then, Mr. Lewis. Are you suggesting some type of an attenuation theory, that because Mr. Nimovitz himself did not utilize what the Court has reluctantly found to be unlawfully obtained materials, that this frees the Government, assuming the Suarez doctrine is correct, from the taint of unlawfully obtained evidence?

MR. LEWIS: Well, I would put it this way: We know that the law is an Internal Revenue agent may make an assessment on the basis of hearsay. Now, if, for example, a reporter had gotten the information—and I suppose it's free to them that certain raids had been made, arrests had been made, markers had been made—and a short story appeared that Max Janis was arrested for bookmaking; in his possession was 6 days of markers totaling $69,000; it was reported that his operation was in report for a period of 77 days; an Internal Revenue Service agent sees that, might call the LAPD to confirm the facts he has seen in the newspaper, and then go ahead and makes the assessment. Now, I [12] think we could almost say that, in effect, is what has happened here.

THE COURT: All right. Let's assume that that was the case.

MR. LEWIS: Yes.

THE COURT: And when we come down to the trial of the matter, does the Government then simply assert that they have made the assessment, and it is, as it stated in Ginsberg by Judge Ferguson, prima facie valid, and rest their case, or what would be the procedure? I'm assuming there has been some report in the newspaper which has been the basis for assessment.

MR. LEWIS: Yes. You know, it's very difficult to say, to answer that question. We have to find out first what the plaintiff has done. You see, let's say we have a situation where the assessment is considered to be totally invalid. Let's assume that it's just thrown out for whatever reasons. Completely arbitrary. It was extrapolated for a period of 15 years, and it came up with a $10 million assessment, and we're in court now on a refund action.

Now, what do we have here? We have a situation where a plaintiff is asking the Court for a refund of taxes. Now, what is being done by this plaintiff? Is the plaintiff coming in and saying, "My taxes certainly are not $10 million; they're only $5000. I rest"? See, then the Government [13] would have to come in and rebut that information in order to prevail in this action. But so far, as we see the status of this case, nothing has been indicated and nothing apparently will be indicated, noting the absence of the taxpayer in this case, to show what the correct liability is.

THE COURT: Well, has not the plaintiff, through the utilization of the pretrial conference order, of course, presented to the Court some matters which were previously determined? In other words, I don't view the the plaintiff as not having come forward with any type of position. The plaintiff, through the pretrial conference order, in the manner in which we have handled the trial, has taken a position on the law based on what are the stipulated facts in this matter, as set forth in the pretrial conference order beginning on page 2:

"The following facts are admitted and require no proof."

We have already discussed, of course, these admitted facts. Has not the plaintiff come forward—whether he has admitted burden or not is another question—with some facts based upon the stipulated and amitted facts?

MR. LEWIS: Well, I don't see what facts the plaintiff has adduced to establish what his correct liability is. The only facts—

THE COURT: Well, first of all, I assume that he [14] is denying any liability in his moving complaint, is he not? I am assuming that. That is the usual position that is taken, that there is no liability. And then he is attacking what may very well be a prima facie valid tax assessment by indicating or attempting to indicate that the evidence upon which that assessment is based was unlawfully obtained evidence. Isn't that the—

MR. LEWIS: Well, yes, but is that the proper approach for a plaintiff in a tax-refund action? Doesn't a plaintiff in a tax-refund action have to establish affirmatively what his correct tax liability is? This is the established law in tax-refund cases. And that's why I'm belaboring this point, your Honor. And there is nothing in the stipulated facts, nothing in the record, that would be probative in a trial of this matter, that would indicate what this plaintiff's correct tax liability is.

THE COURT: Well, do I gather that your position is, then, Mr. Lewis, that for some reason the plaintiff is precluded from asserting any what we can call technical defenses, such as unlawful evidence, as a basis for the Government's tax assessment; that they have to go in and say, "They say 5 days at so much. It was really 5 days at something less. And they extrapolate to 77 days, but it was only 32 days"; that they are precluded from attacking the allegedly unlawful basis of the tax assessment?

[15] MR. LEWIS: No, they're certainly free to do so, and they've done so in various motions. My only point is, your Honor, that even if all the plaintiff's motions were granted, the Court would be just at a loss to enter any kind of a judgment, because the plaintiff has not shown what his correct tax liability is. It simply would

be immaterial, my point is, your Honor; that the taxpayer can say that the tax assessment is invalid, it was based upon illegal materials, and it's snowing outside today. But the Court still is in no position to enter any judgment to determine what his tax refund should be. And I think this is the crucial point in this tax-refund action here.

THE COURT: Well, as set forth in Ginsberg, let's assume that the tax assessment is prima facie valid and, it being presumptively correct, must stand until it can be affirmatively controverted by a preponderance of the evidence provided by the taxpayer. Assuming for the sake of our discussion that the taxpayer has produced a technical legal argument that there was no admissible evidence upon which the assessment could be based, do we not have to reach the position, then, that the assessment must fall in its entirety?

MR. LEWIS: I would just read a little bit further in Judge Ferguson's decision there, your Honor. And it's cited on page 7 of our pretrial memorandum. He [16] goes on to say, "The assessment can be overturned only by evidence which clearly demonstrates the proper amount of tax which he owes the Government." And I think this is a patently accurate statement of the law in tax-refund cases.

THE COURT: Well, the sentence above that states, "One engaged in the business of accepting wagers cannot rebut the Government's wagering tax assessment against him on mere allegations that such assessment was arbitrary, excessive, invalid, and illegal."

Now, the plaintiff is alleging that the assessment was illegal, but he hasn't rested on a mere allegation in his pleading that it was illegal; we have facts presented, through the stipulated and admitted facts, which lead the Court to believe that the sole source for the ultimate assessment and the essential source for the assessment was the unlawfully obtained materials obtained through the search warrant.

MR. LEWIS: Yes. But what do you do, your Honor, though, with the second sentence, which shows what

really must be done, the affirmative burden upon the plaintiff about establishing his correct liability?

THE COURT: Well, in my judgment, the plaintiff has done more than simply allege invalidity or illegality; he has gone forward to prove that there are no admissible [17] facts to uphold the assessment, and I would think that that would relieve him of the burden, then, of —it would seem to fly in the face of it. If the Court does find, as the Court feels that it must under the stipulated facts and the law that the Court is applying, that there is no basis for the assessment, then it would seem to be a fruitless and unnecessary act for the plaintiff to rebut an assessment which has been held to be based upon illegally obtained evidence.

MR. LEWIS: Well, we—

THE COURT: The law should not require a fruitless act or an unnecessary act. If the assessment itself is flawed, flawed to the extent that it is completely based upon unlawfully obtained evidence, then there is nothing to rebut, in essence.

Now, perhaps we are involved in a semantic argument or perhaps I am not grasping your position, Mr. Lewis, and I am certainly willing to hear further from you.

MR. LEWIS: Well, I'm afraid I'd only be repetitious at this point, your Honor. It seems quite clear that certainly a first step could be for a plaintiff to come in and show that the wagering excise tax or any tax liability was arbitrary, the Internal Revenue agent might have had a grudge against a particular taxpayer, he couldn't possibly have made that much money, because he [18] was sick 360 days of the year, and so on and so on, and show that there would seem to be no rational basis for the assessment as entered by the Internal Revenue Service, and just do that properly, regardless of the reason. And it just seems to me, your Honor, that at this point in a tax-refund action we are simply left with nothing for the Court to make a judgment on, because the Court must ask, "All right, you have shown me that the Internal Revenue Service's assessment is erroneous for some reason." Now, I don't think in this case there is anything in the record—I don't even think an allegation—

that the plaintiff has not engaged in any wagering activities, and if that's the case, we can certainly rebut that without any trouble. But I don't think that's the problem here. I think the problem is the extent. So we're talking about the amount of the tax liability rather than whether there is any tax liability at all. Now—

THE COURT: You do take the position, Mr. Lewis, I gather, that the plaintiff may appropriately and properly rebut the rational basis for the assessment; I believe you just stated that?

MR. LEWIS: Well, I say he can do that, but it really is immaterial for a tax-refund action. You see, it simply is immaterial, because we don't get anywhere, because if the plaintiff came forward instead of doing all [19] that, and simply said, "My tax liability for the period is X dollars," then the presumption disappears for the Government assessment, and the Government must come forward and say, "Well, it's not X dollars. Here's the information we have to show that it's 3X dollars," you see. So it really doesn't matter. But until he says what his correct tax liability is, we don't go anywhere.

THE COURT: Well, is this some type of a technical requirement that you would impose? For example, the plaintiff, Max Janis, would take the stand and say, perhaps in a totally conclusionary fashion, "My tax liability is zero dollars," step down from the stand after appropriate cross-examination, and then the prima facie case of the Government has dissolved and they must come forward with evidence, or what?

MR. LEWIS: Well, I think that, in essence, right down to the bone, is what it is. But you say very quickly, "subject to cross-examination," and I think that's true. If the taxpayer came up there and said what his correct tax liability is, we would certainly delve into some detail on how he establishes that.

Now, we do have a burden of proof here on the taxpayer to establish his correct tax liability. It would seem to me that a Court would perhaps be reluctant to simply accept the naked statement on behalf of any taxpayer what his [20] liability was without at least explaining or supporting that statement, and we will bring that out.

THE COURT: I appreciate that. I agree with you.
MR. LEWIS: Certainly.
THE COURT: But I'm trying to find out, is it some technical mechanism which can be triggered, perhaps by a general denial of the taxpayer, which would then allow the taxpayer to determine the rational basis, to use your words, for the Government's assessment, and until he makes a general denial, at least, he is somehow estopped from attacking the rational basis of the assessment?
MR. LEWIS: Well, it wouldn't have to be the rational basis. He would simply be attacking the mathematical basis of the assessment. And I think that's correct. I think that is correct. And that's why we would have the opportunity, of course, to see what the taxpayer is going to try to establish his correct liability with, and that's what is essentially relevant in a case like this.
THE COURT: Well, again, I'm probably being redundant as well, but it doesn't seem to be necessary or material for the taxpayer to make a general denial, any more than presumptively he has in the pleadings, for us to reach the underlying legal issues and factual issues as set forth by the pretrial conference, which are the bases, the putative bases for the assessment in question here.
[21] Let's hear from Mr. Sherman. I'm tired of carrying his case for him. Perhaps he can tell us whatever he wishes to tell.
MR. SHERMAN: Your Honor, the only thing I'd like to say is this, and it's not pointed towards exactly what the Court was talking about. This is my personal feeling on the matter. It will take about a minute, if the Court will allow me that long.
Judge, I was an Assistant United States Attorney from '61 through '64. I held Mr. Lewis' job in the tax division. Now, since leaving the Government's office I've engaged exclusively in the criminal practice, both in state and federal courts, and this procedure has been a bone which has been sticking consistently in my throat for the past seven years.
Now, here is what happens: The police go out—and I'm not talking about the particular officer involved

in this case, who I happen to think is a very fine gentleman—but the police go out and they arrest somebody, usually in a narcotics case or bookmaking case. If that man has money on him they turn right around, they in effect steal that money, they call the Internal Revenue Service, and they come down and they levy.
Now, usually the attorney involved in that type situation is not an attorney experienced in tax procedures but [22] is a criminal attorney. Now, I sort of crossed into both areas. This is a practice which I think ought to be stopped. It's an illegal, dishonest, deceitful practice. I don't think the Government should be placed in a position where they take from a man, who admittedly is not a bastion in the community, who may be engaging in an illegal activity, but nevertheless is a citizen under the constitution, steal his money and then tell him that he has to get upon the stand and incriminate himself in order to obtain a refund.
I would just agree with the reasoning of the Court. I think we've set it forth in our moving papers, we've had a series of motions on discovery in this case, and I think we just finally reached the issue of whether or not the Government can base an assessment solely upon illegally obtained evidence and then force a taxpayer to take the stand and incriminate himself if he wants to get his money back. I just respectfully submit, the Court's reasoning is correct. Thank you, sir.
THE COURT: Well, I would not want to have it concluded from the record that because the Court has stated its reasoning and rationale as previously indicated, that it is holding that there was any theft of the plaintiff's money or any impropriety in the procedures of the Government. My holding is limited to the facts of this case and a belief that the evidence, as presented through the stipulations [23] and admissions of facts, requires the Court to hold that the basis for the tax assessment was substantially, if not completely, the result of an unlawful search, and that therefore the tax assessment must fall or fail. That is the limited finding of the Court and holding of the Court, and I do

not wish to have this case quoted as a precedent for any change in the Government's procedures. Each case will have to be tried on its own merits.

MR. SHERMAN: Surely, your Honor. I wasn't attempting to infer that the Court was making any finding like that. I was just telling you what was going on in my head. I think the legal issues have been discussed rather completely in the written memoranda which have been furnished to the Court, and I just have nothing to add to that.

THE COURT: All right.

Mr. Lewis, do you wish to be heard further?

MR. LEWIS: Well, I think not, your Honor. I don't know what else we can add here. We're at a position that we simply don't have in the record anywhere a statement of correct tax liability, and it will just have to be repeated that the Government's position is that in a tax-refund case, the taxpayer simply cannot meet a burden of proof in that regard, cannot simply rest upon finding the assessment illegal, and—once again I must state this, [24] your Honor: We don't have a situation where there is either no liability, such as a situation perhaps where a statute of limitations may have expired. A plaintiff in that case might come in—and he could do this under injunction proceedings, as a matter of fact—and point out to the Court that the assessment is illegal and it's invalid because it was entered at a time beyond the statute of limitations. So we're talking in a case like that, where there is simply no liability or the liability set forth in the assessment.

In this case we have nothing to show that the taxpayer was not involved in some gambling activities. The Supreme Court, in Marchetti and Grosso, went to some pains in the footnotes to explain that wagering is still a taxable activity in this country. So we have a taxable activity engaged in by the taxpayer. We have the Internal Revenue Service doing whatever it can—and it doing it in good faith, because there is no showing here that the Internal Revenue Service knew of the arrest prior to the fact or that the Los Angeles Police Department conducted the arrest with the intent of

helping the Internal Revenue Service. So we have the Internal Revenue Service doing whatever it can to protect the revenue, to tax all taxable transactions, and an assessment is made under a patently reasonable method. It didn't go a number of years, like some [25] of the other cases did, also perhaps on a reasonable basis. It just confined its tax assessment to the monetary amounts and the durations that it had fairly hard facts on.

Now, what we simply have then is an assessment made against a taxpayer who is engaged in a taxable activity. We are now in a court for a refund action, where the taxpayer must show that that assessment is incorrect because it's too high, and we submit, your Honor, that the taxpayer simply has not done that, and I think the judgment must be for the Government on that basis.

THE COURT: All right. The Court has previously indicated its reluctance—let's say unhappiness—in this extension of the exclusionary rule, a rule which has many defects and has not been successful in its primary alleged reason for being. I would hope that the Government would see fit to take this matter up to the Ninth Circuit. There is no law in the Ninth Circuit which has assisted this Court on this particular subject. I think it is a matter that needs clarification, and I would certainly urge the Government to seek an examination by the Circuit of this matter.

But the Court is going to, based on the reasons previously indicated, find for the plaintiff in this matter.

Is there anything further, gentlemen?

MR. SHERMAN: Your Honor, just as a matter of procedure, I'm not quite sure—several matters. If I [26] might address the Court. The parties in the pretrial order listed a series of exhibits which the plaintiff intended to introduce, to wit, your Honor, the search warrant, the affidavit in support of the search warrant, the return of the search warrant, the transcript of the hearings on the motion to quash in the state court, the defendants' answers to interrogatories, requests for admissions, the defendants' amended answers to inter-

rogatories and requests for admissions and the pretrial conference order itself, which has a series of stipulated facts in it, to wit, under Section III on page 2 through page 5. Now—

THE COURT: Yes. I think it's of course important that the defendants' exhibits, which are, one, the certified copy of the Certificate of Assessment and Payment, Internal Revenue Form 48340, be received in evidence, and the other exhibits of the plaintiff as enumerated. The Court, of course, has read and considered all of those before in the various pretrial motions that had been made by counsel, but I think, to have a complete record for the Circuit, that those should be received.

Are there any objections, for that matter by either side, to the exhibits of plaintiff or defendants?

MR. SHERMAN: None from the plaintiff, your Honor.

MR. LEWIS: No, your Honor.

[27] THE COURT: All right. They will be received as marked. The pretrial conference order, of course, is part of the record in this matter.

MR. SHERMAN: Now, your Honor, excuse me. If I might inquire, is it deemed stipulated that the facts A through L in the pretrial conference order under Part III on pages 2 through 5 are stipulated to be true? May we stipulate those facts are true and correct, Mr. Lewis, for the purpose of the trial?

MR. LEWIS: Yes. I think so. I think so, your Honor.

THE COURT: All right. The Court accepts the stipulation. I think that is inherent in the pretrial conference order. You have, "The following facts are admitted and require no proof," and you gentlemen have previously signed this. But the Court does accept the stipulation.

MR. SHERMAN: Thank you, your Honor. I have marked the pretrial conference order as Plaintiff's Exhibit 6, and I wonder if perhaps this shouldn't be introduced as part of the record, or does the Court deem that the one that's filed is sufficient?

THE COURT: Well, do you wish to mark it Plaintiff's Exhibit 7? You seem to have listed already six different exhibits, Mr. Sherman.

[28] MR. SHERMAN: I'm sorry, your Honor. I only have—

THE COURT: In the pretrial conference order you have listed, on page 7, six different exhibits.

MR. SHERMAN: May I have what I did, your Honor? I wonder if I numbered erroneously.

THE COURT: Let me read them into the record. The search warrant, No. 1878, is Plaintiff's Exhibit No. 1. The affidavit in support thereof is Plaintiff's Exhibit No. 2. The return to the search warrant is Plaintiff's Exhibit No. 3. A copy of the reporter's transcript in the motion to quash of February the 18th, 1969, is Exhibit 4. Exhibit 5 is defendants' Answers to Requests for Admissions and Written Interrogatories. And Exhibit 6 is defendants' Amended Answers to Requests for Admissions and Written Interrogatories.

MR. SHERMAN: I made an error, your Honor. Plaintiff's Exhibit No. 7 would be the pretrial conference order, and I would like to introduce that at this time if I may.

THE COURT: All right.

Any objection, Mr. Lewis?

MR. LEWIS: No, your Honor.

THE COURT: It will be received as marked.

(Plaintiff's Exhibit 7 was received in evidence.)

[29] MR. LEWIS: Your Honor, may I address the Court for a minute on the issue of the illegality of the search and seizure?

THE COURT: All right. Before we get to that, the defendants' Exhibit A has been offered and received, then, Mr. Lewis?

MR. LEWIS: Yes. I thought so.

THE COURT: And has the clerk been given a copy of that?

MR. LEWIS: Yes, your Honor.

THE COURT: Fine. You may be heard.

MR. LEWIS: The only question I had, your Honor, perhaps the Court would care to detail somewhat the basis for finding the affidavit insufficient. And I would preface this discussion by pointing out certain factors very briefly that we thought in the affidavit here distinguished it from Spinelli, in that not only was the reliability of the two informers established, but it was believed to be stated that the informers were speaking with personal knowledge, which we thought is an imporant factor.

Not only that, but another bookmaker was named in this affidavit, which lent some corroboration to the affidavit. An additional informer, so we had two informers giving coinciding information, and we had prior bookmaking activity of Max Janis and previous arrests and also of the [30] other bookmaker stated in the affidavit, and it would have been the Government's position—I think we did set that forth in our responses to the motion—that taken as a whole, as some of the courts have suggested, keeping in mind the policy which should favor warrant rather than no-warrant arrests, taken as a whole, the affidavit would have seemed to come within the prerequisites of Spinelli and other decisions in that regard.

THE COURT: Well, I think it's a close case, Mr. Lewis. I don't think this is an affidavit which clearly on its face, without question, doesn't meet the Spinelli and Aguliar requirements. I don't know that it's necessary for the Court to make any findings of fact, because I view this as a legal question. The Circuit can look just as well as the Court has looked at this affidavit and determine whether or not on its face it is sufficient. We have not heard any evidence, and it is not necessary to determine the validity of that affidavit to look at it, to hear evidence, and so I don't think any findings are necessary by the Court.

MR. LEWIS: All right. I was just suggesting, your Honor, what I have stated does, of course, appear on the face of the affidavit.

THE COURT: Yes, I agree with you.

MR. LEWIS: Yes. All right. Well, thank you, [31] your Honor. That should do it as far as that goes.

THE COURT: Is there anything further, gentlemen?

MR. SHERMAN: Nothing from the plaintiff, your Honor.

THE COURT: All right. The plaintiff to prepare the appropriate order and file it with the Court within five days.

MR. SHERMAN: Your Honor, I wonder if the Court would allow counsel for the plaintiff until next Monday to have the findings of fact and order?

THE COURT: Yes, that is satisfactory.

Is that satisfactory with you?

MR. LEWIS: Well, it would be Tuesday, I suppose, with the legal holiday.

MR. SHERMAN: Yes, your Honor, if the Court please, I'd appreciate that very much.

THE COURT: All right. Monday is a legal holiday.

All right. Thank you, gentlemen. We will be in recess.

MR. SHERMAN: Thank you, your Honor.

[32]

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Number and Title Omitted)

REPORTER'S CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter for the United States District Court, Central District of California.

I further certify that the foregoing 31 pages comprise a true and correct transcript of the proceedings had in the above-entitled cause on the date specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California this 29th day of June, 1973.

/s/ Don Mehler,
DON MUHLER, CSR
Official Reporter

EXHIBIT 1

IN THE MUNICIPAL COURT OF
_____ JUDICIAL DISTRICT
COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA

SEARCH WARRANT

No. 1878

County of Los Angeles

The People of the State of California to any sheriff, constable, marshal, policeman, or any other peace officer in the County of Los Angeles:

Proof, by affidavit, having been this day made before me by Leonard Weissman, #11183, LAPD, Administrative Vice that there is probable and reasonable cause for the issuance of the search warrant, as set forth in the affidavit attached hereto and made a part hereof as if fully set forth herein; you are, therefore, commanded to make immediate search in the daytime (at any time of the day or night good cause being shown therefor) of the premises located and described as 1342 N. Fuller Avenue, apt. #211, Los Angeles, California, an apartment of a multi-unit apartment house; and 1155 N. LaCienega, apt. #904, Los Angeles, California, an apartment of a multi-unit apartment house, and the persons of Max Janis, male Caucasian, date of birth 10-14-17 five feet 11 inches, 200 pounds, brown hair, brown eyes; and Morris Aaron Levine, male Caucasian, date of birth approximately 1909, five feet 9½ inches, 185 pounds, black hair, brown eyes, for the following personal property, to wit: Bookmaking paraphernalia, but not limited to owe-sheets, betting markers, professional markers, copies of sports journals, copies of the National Daily Reporter, football schedules, adding machines, ledger books, telephone and address books, disposable paper, and any and all other materials used in bookmaking, and if you find the same or any part

thereof, to bring it forthwith before me at the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California, or to any other court in which the offense in respect to which the property or things taken is triable, or retain such property in your custody, subject to the order of this court pursuant to Section 1536 of the Penal Code.

Given under my hand and dated this 26th day of November, 1968.

/s/ [Illegible]
Judge of the Municipal Court

EXHIBIT 2

IN THE MUNICIPAL COURT OF THE
LOS ANGELES JUDICIAL DISTRICT
COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA

No. SW 1878

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

AFFIDAVIT IN SUPPORT OF AND
PETITION FOR SEARCH WARRANT

Personally appeared before me this 25th day of November, 1968, the affiant, Leonard Weissman, #11183, LAPD, Administrative Vice, a peace officer, who, on oath, makes complaint, and deposes and says that he has and there is probable and reasonable cause to believe, and that he does believe, that there is now on the premises located at and also described as 1342 N. Fuller Avenue, apt. #211, Los Angeles, California, an apartment of a multi-unit apartment house; and 11155 N. LaCienga, apt. #904, Los Angeles, California, an apartment of a multi-unit apartment house, and in (a) vehicle(s) described as and on the person(s) of Max Janis, male Caucasian, date of birth 10-14-17, five foot 11 inches, 200 pounds, brown hair, brown eyes; and Morris Aaron Levine, male Caucasian, date of birth approximately 1909, five feet 9½ inches, 185 pounds, black hair, brown eyes, the following personal property, to wit: Bookmaking paraphernalia, but not limited to owe-sheets, betting markers, professional markers, copies of sports journals, copies of the National Daily Reporter, football schedules, adding machines, ledger books, telephone and address books, disposable paper, and any and all other materials used in bookmaking.

Your affiant says that there is probable and reasonable cause to believe and that he does believe that the said

property constitutes: (CHECK THE APPROPRIATE BOX, OR BOXES)

( )—stolen or embezzled property;
(XX)—property or things used as the means of committing a felony;
(XX)—property or things in the possession of a person with the intent to use it as a means of committing a public offense, or in the possession of another to whom he may have delivered it for the purpose of concealing it or preventing its being discovered;
(XX)—property or things which consist of an item or constitutes evidence which tends to show that a felony has been committed, or tends to show that a particular person has committed a felony.

Your affiant says that the facts in support of the issuance of the search warrant are as follows:

Your affiant has been a police officer for the past 6½ years, employed in such capacity by the Los Angeles Police Department, and has acted and received the information set forth in this affidavit in that capacity.

Your affiant is now and has been for the past 2 years assigned to the Vice and Bookmaking Detail thereof.

On the date of November 14, 1968, at approximately 12:00 noon your affiant (received information from) a confidential, reliable informant. This informant stated that bookmaking was being conducted over telephone no. 466-0363. This informant indicated to affiant that a Max Janis was taking bets over this telephone number on both sports events and horse racing events. Additionally, this informant told your affiant that Morris Levine was involved and participated in the same bookmaking activities. The informant indicated that Levine uses telephone number 655-8084 and number 652-0617. The informant said that Morris Levine sometimes handles bookmaking activities from Max Janis' apartment.

This informant has given affiant information in the past which has led to the arrest of two individuals for violation of Section 337a, Penal Code (Bookmaking).

Both individuals were filed on by the District Attorney's Office of the County of Los Angeles and their preliminary hearings are still pending. This same informant also supplied information which led to the arrest of five other individuals on felony charges. Of these five individuals, two were filed upon by the District Attorney's Office of the County of Los Angeles. Their preliminary hearings have been held and they were bound over to Superior Court. Their trials are set for December 3, 1968. This informant has never given information which has been incorrect.

A check was made using departmental facilities of telephone number 466-0363. This telephone check indicated that this telephone number and an additional telephone number, 463-3648, were both non-published numbers listed to Max Janis at the address of 1342 N. Fuller Avenue, apt. #211, Los Angeles, California. This same telephone check indicated that there was a third published telephone number at that same location, number 463-3531, published to Nancy L. Janis. It is affiant's opinion that a bookmaker, under these circumstances, would be using the non-published numbers for his bookmaking activities, both to receive and forward bookmaking wagers. The fact that they were non-published would allow him to have the uninterrupted use of these phones for bookmaking purposes. His published phone at the location would be used for his personal (non-bookmaking) activities.

Using departmental facilities, telephone number 655-8084 and telephone number 652-0617 were checked. Both telephone numbers came back as non-published numbers listed to Morris Levine at the address of 1155 N. La-Cienega Boulevard, apt. #904, Los Angeles, California.

A check of the criminalistic records maintained by the Los Angeles Police Department was made. This check revealed that Max Janis has been arrested for violations of Section 337a, Penal Code (Bookmaking) three times and for Conspiracy to Commit Bookmaking once. The records indicate that one conviction for bookmaking resulted. As for the other arrests, no disposition was shown.

The Los Angeles Police Department criminalistic records were checked to determine the past criminal record of Morris Levine. This record checked indicated that Morris Levine has been arrested nine times for violations of Section 337a, Penal Code (Bookmaking) and Conspiracy to Commit Bookmaking. These records indicate that Morris Levine was convicted once for a violation of Section 337a, Penal Code and once for Conspiracy to Commit Bookmaking.

On November 21, 1968, your affiant was contacted by Sgt. M. Briggs, Los Angeles Police Department Administrative Vice Division. Sgt. Briggs indicated to affiant that he had been contacted by a reliable informant who told him that Max Janis and Morris Levine were currently conducting sports and horse bookmaking activities. This informant indicated to Briggs that Levine was bookmaking out of the location of 1155 N. LaCienega Boulevard, Los Angeles, California, apt. #904. Sgt. Briggs indicated to affiant that this informant had previously given information to Sgt. Briggs that has resulted in at least two arrests and convictions for violations of Section 337a, Penal Code (Bookmaking).

Your affiant has been employed as a member of the Los Angeles Police Department for the last six and one-half years. During the past two years, he has been assigned full time to the Vice and Bookmaking Detail thereof and has made approximately fifty arrests of persons for bookmaking offenses in the County of Los Angeles. He has qualified and testified as an expert witness in such field in both the Municipal and Superior Courts in the County of Los Angeles. Affiant has received training at the Los Angeles Police Academy and has worked with other policemen who are qualified in the field of bookmaking and has had numerous conversations with individuals involved in bookmaking activities.

Based on your affiant's past experience and also the fear expressed by the informant involved in this investigation, your affiant desires to keep the identity of informant secret and confidential because affiant believes that the disclosure of said informant's identity would endanger his safety and well-being, subjecting him to

harm and danger. Further, affiant believes that the disclosure of said informant's identity would destroy and impair his future usefulness to law enforcement officers engaged in investigating and uncovering illegal criminal activities.

It should be noted that Sgt. Briggs has indicated to affiant that the informant who had given him information related to this bookmaking investigation also expressed fear if his name were revealed and that he also would be subjected to harm and danger if his identity were discovered. Sgt. Briggs also indicated that if his name were revealed he felt that the revelation of said informant's identity would destroy and impair the informant's future usefulness to law enforcement officers engaged in investigating and uncovering illegal activities. It is therefore requested that this informants identity be kept secret and confidential.

From the nature and context of the information supplied by the informant to this affiant, and from the nature and context of the information which was supplied to Sgt. Briggs, as told to this affiant, it is believed that the informants did, at all times mentioned in this affidavit, unless otherwise specified, were speaking with personal knowledge.

Based on the aforementioned information, it is your affiant's expert opinion that Max Janis and Morris Levine are conducting a bookmaking operation out of the locations of 1342 N. Fuller Avenue, apt. #211, Los Angeles, California and 1155 N. LaCienega, apt. #904, Los Angeles, California.

Your affiant commenced the actual physical mechanics of preparing this affidavit and attached search warrant at 11:40 a.m. of November 25, 1968; and your affiant affixed his signature under oath to this affidavit before the undersigned magistrate at the time and date attested by said magistrate; the elapsed time reflected herein has been diligently utilized by your affiant in the mechanics of physically preparing these documents, locating and consulting with Deputy District Attorney Alan M. Genelin of this County, in reference to the aforementioned preparation; locating the appropriate magis-

trate; and transporting these documents to the magistrate for his official action in connection therewith.

Your affiant has reasonable cause to believe that grounds for the issuance of a search warrant exist, as set forth in Section 1524 of the Penal Code, based upon the aforementioned information, facts and circumstances.

Your affiant prays that a search warrant be issued, based upon the above facts, for the seizure of said property, or any part thereof, in the daytime, good cause being shown therefore, and that the same be brought before this magistrate or retained subject to the order of this court, or of any other court in which the offense in respect to which the property or things taken is triable, pursuant to Section 1536 of the Penal Code.

/s/ Leonard Weissman
(Affiant)

Subscribed and sworn to before me on this 26th day of November, 1968, at 9:55 a.m.

/s/ [Illegible]
Judge of the Municipal Court

EXHIBIT 4

IN THE MUNICIPAL COURT OF LOS ANGELES
JUDICIAL DISTRICT
COUNTY OF LOS ANGELES,
STATE OF CALIFORNIA

REPORTER'S TRANSCRIPT OF HEARING
MOTION TO QUASH

(Number and Title Omitted)

(Filed: February 18, 1969)

LOS ANGELES, CALIFORNIA,
TUESDAY, FEBRUARY 18, 1969

1:30 P.M.

THE COURT: People versus Max Janis and Morris Aaron Levine.

Will Counsel please state their appearance for the record.

MR. LEWIS: Arthur Lewis for Defendant Max Janis, your Honor.

MR. SOLOMON: May the record reflect Max Solomon representing Defendant Levine, and he is present.

MR. LEWIS: Your Honor, at this time there is a motion before the court to quash Search Warrant Number—may we have the number for the record, counsel? —1878. The motion is based upon the grounds that the affidavit doesn't state sufficient facts to justfy the issuance thereof. And, for the record, I would like to point out that we supplied the court this morning with a copy of the Opinion of the United States versus Spinelli. Counsel has the citation—perhaps we can get it into the record—which was recently handed down by the United States Supreme Court. The matter was submitted to your Honor in Chambers and you were afforded an opportunity, I believe, of reading the Opinion of the Court.

We ask the court to rule at this time on the motion.

THE COURT: Will you state the citation from the Spinelli case, please.

MR. LEWIS: For the record, your Honor, the only [3] information we have—this is from UNITED STATES LAW WEEK, that states Opinion Number 8, October Term, 1968, delivered on January 27th.

MR. SOLOMON: That's right. SPINELLI versus the United States, your Honor, came down January 27, 1969.

Your Honor, may I state that I join in the motion to quash.

THE COURT: All right. Mr. Perruzza?

MR. PERRUZZA: Yes, your Honor. For the record, People would like to contend that we have complied with *Spinelli*. We have information here by two reliable informants; refutation of that "it doesn't set out in the search warrant as to why the informants are reliable."

We also state that, yes, we proceeded to investigate the backgrounds of both the defendants in this matter and both defendants have prior criminal records concerning bookmaking; also the private phone numbers, which were checked out and which turned out to be private numbers at the address stated in the Affidavit.

That in addition to that, there is allegation in the Affidavit that at all times mentioned in the affidavit unless otherwise stated in the affidavit, that the information as supplied to Sgt. Briggs, as told to this affiant, it is believed that the informant did, and at all times mentioned in this affidavit unless otherwise specified, was speaking with personal knowledge.

[4] The People, for the record, would also like to point out to your Honor that in the statement of the United States—Spinelli versus The United States, the majority decision here says: Here the only facts supplied were that Spinelli was using two phones, two specified phones, "and that these phones are being used in gambling operations." The Court further goes on to say:

"This cannot by itself be said to support both the inference that the informer was generally trustworthy and

that he had made his charge against Spenelli on the basis of information obtained in a reliable way."

In Appendix of this decision it is set out, the only information the police supplied in the affidavit is as follows: "Federal Bureau of Investigation has been informed by confidential, reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information" . . .

MR. LEWIS: I will stipulate that, as counsel is reading, it is contained in the Opinion.

MR. PERRUZZA: For the record, your Honor. . . . "by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136."

People would also like to say, for the record, that the concurring opinion which makes this a majority decision by the United States Supreme Court, set down by Mr. Justice White, states that the majority opinion in the Spinelli case [5] is correct, that the affidavit as set out in the search warrant is adequate to supply the Magistrate with information to issue a search warrant for probable cause. In fact, Mr. White concludes his consideration in the decision by saying: "Pending full scale reconsideration of the Draper case, on the one hand, or of the Nathanson and Aguilar cases on the other, I join in the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an equally divided court."

So at most, we have a decision by the United States Supreme Court in which the one person who makes it a decision states that the majority is wrong.

MR. LEWIS: Well, I will disagree with the conclusion that it states that they are wrong, your Honor. Your Honor can read the Opinion?

THE COURT: Is the matter submitted?

MR. LEWIS: Submitted.

MR. SOLOMON: Matter submitted.

I might state, your Honor, just for the record, that that matter has been—the entire case has been discussed, and counsel was present, and to go over the entire thing would be repetitious. I think your Honor has read it and it is—I will submit the matter.

THE COURT: Well, the court is going to grant the motion to quash, on the following grounds: First, that the application has failed to set forth the underlying circumstances [6] necessary to enable the Magistrate to independently judge the validity of the information—informant's information.

The court will concede that the second provision of the Aguilar case has been complied with, that the informant has been described and the fact of his reliability has been established in the search warrant.

And, thirdly, the court wishes to indicate that the reason for the decision is that by failure to comply with, Number 1, the warrant, the warrant does not assure that safeguard that a distinterested party might—that is, a Magistrate—might interpose itself between the police and the citizenry.

MR. LEWIS: Your Honor, I'd have one further motion. Certain items were taken from the defendants at the time of their arrest. The Officers have, pursuant to the appropriate Code Sections, brought all of the items seized to the court. There was a receipt issued at the time of the seizure. And I would ask the court at this time to make the order ordering the return of these items to the defendants, including certain moneys which were in the possession of the defendant Janis at the time of the arrest.

MR. PERRUZZA: Before your Honor rules on that, I'd like to call to your Honor's attention that there is a lien filed by the Internal Revenue on certain funds seized, that were seized in this matter, and that when counsel requests the matter to be returned, the return of these funds, that he's [7] gone beyond jurisdiction. The matter has to be heard before the Federal Courts. The lien is in the file. The clerk has the lien.

MR. LEWIS: If your Honor please, there is no matter of Federal jurisdiction at this point. Certain items were taken pursuant to the search warrant. The Magistrate has the authority, he has the jurisdiction. As a matter of fact, the Code states that the Magistrate shall order its return, not "may" order its return. The court does have the required jurisdiction. This isn't a Federal

matter as yet. It can be returned to the defendant here in the courtroom. Counsel have assignment of these funds; we can hold them, if the United States government want a levy on any moneys that may be due to the defendant. But these aren't any funds which are due to the defendant from the court or the clerk. I recognize there's levies all over. But under 1539—

THE COURT: Motion submitted?

Motion to quash search warrant granted.

All items will be ordered to be returned to the defendants excepting those funds which have been levied upon by the Internal Revenue. That matter will have to be taken up by the Internal Revenue. I can't release them.

MR. LEWIS: Well, they can't be released then. Will they be kept by the clerk? There has been no seizure by the United States Government.

THE COURT: Notice of Levy. I think kept by the clerk. [8] Is that a lien or a levy?

THE CLERK: This is a levy, Notice of Levy.

THE COURT: Levy; have to be kept by the clerk.

MR. PERRUZZA: May the court order the officers—that the funds be turned over to the clerk?

THE COURT: I would have to let the Government do that.

MR. PERRUZZA: Fine. Thank you, your Honor.

THE COURT: Bail exonerated.

MR. PERRUZZA: Thank you.

MR. SOLOMON: Thank you, your Honor.

MR. LEWIS: Your Honor, I don't want to belabor that point. The question is at this point, the officer was holding the property pursuant to the order of the court. Is he being instructed on what to do with the funds at this point?

THE COURT: No. The Government will have to plead on that. Make the necessary motion before the Government.

MR. LEWIS: Your Honor, may we have one further order? That is, the items seized and all copies?

THE COURT: Well, the People aren't here.

MR. LEWIS: Oh. All right.

Max, get the D. A. back.

MR. SOLOMON: Do you want the defendants?

MR. LEWIS: I have got one.

THE COURT: All right. Yes, Mr. Lewis?

MR. LEWIS: Your Honor, I would have an additional request: That the order read that all items taken from the defendants, as your Honor has indicated, other than the money, [9] be ordered returned, including all copies thereof which may have been made by the law enforcement agencies, and disposition. I only want the order and the record to reflect, in the event of further proceeding—I am anticipating perhaps Federal proceedings—in the event that the Government has copies of any of these items, I feel that the order indicating that there's been an unlawful seizure would be clearer.

THE COURT: Well, are there any such copies?

MR. PERRUZZA: I don't know, your Honor.

MR. LEWIS: So, if the court order read "any copies, if made."

MR. PERRUZZA: I think, your Honor, that would be beyond your jurisdiction; that the Federal Government—

MR. LEWIS: No, not the Federal Government.

That those orders and any copies which may have been made.

THE COURT: That are in Mr. Perruzza's possession?

MR. LEWIS: Yes.

MR. PERRUZZA: May the record also order that the defendant not destroy these before any other further proceeding?

THE COURT: No. I can't make that order.

MR. LEWIS: That's beyond the Code Section.

MR. SOLOMON: The Code doesn't say anything about that.

THE COURT: Order to include those items "and copies."

Do you have anything else?

MR. PERRUZZA: Thank you, your Honor.

[10] THE COURT: You're welcome.

Take a recess.

—ooOoo—

CERTIFICATE OF ASSESSMENTS AND PAYMENTS

Excise

NAME OF TAXPAYER	ADDRESS (Number, street, city, and State)	EIN OR SSN
Morris Aaron Levine and Max Janis	1155 N. LaCienega Blvd., Apt. 104, Los Angeles, Ca. 1343 N. Fuller Ave., Apt. 211, Los Angeles, Ca.	546-32-5693 550-10-2348

DATE (a)	EXPLANATION OF TRANSACTIONS (b)	ASSESSMENT (ABATEMENT) (c)	CREDIT (CREDIT REVERSAL) (d)	BALANCE (e)	DLN OR ACCOUNT NO. (f)	23C DATE (g)	PERIOD END (h)
							9-14-68 to 11-30-68
	Balance Due Return				95613340-02000-68	12-5-68	
	Tax	89,026.09					
	Interest	123.97		89,150.06			
12-5-68	First Notice						
12-5-68	Delinquent Account Issued						
2-25-69	Payment		5,097.00	84,053.06			

I certify that the foregoing transcript of the account of the taxpayer named above in respect to the taxes specified is a true and complete transcript for the period stated, and all assessments, penalties, interest, abatements, credits, and refunds relating thereto as disclosed by the records of this office as of the date of this certification are shown therein.

SIGNATURE OF DIRECTOR	LOCATION	DATE
F. S. Schmidt By: E. P. Weathersbee, Chief, Special Procedures Staff	Los Angeles, California	March 7, 1972

U. S. TREASURY DEPARTMENT - INTERNAL REVENUE SERVICE

GPO 874-[illegible]

4340 (9-67)

Exhibit A

BEST COPY AVAILABLE

NOTICE OF APPEAL

(Number and Title Omitted)

(Filed: April 3, 1973)

TO THE PLAINTIFF AND HIS ATTORNEYS, SHERMAN AND STURMAN, 8500 WILSHIRE BOULEVARD, SUITE 908, BEVERLY HILLS, CALIFORNIA 90211:

PLEASE TAKE NOTICE that the defendants, United States of America and Frank S. Schmidt, District Director of Internal Revenue, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order entered in this case on February 27, 1973, and from the Court's denial of defendants' motion for new trial by minute order of March 26, 1973, and ruling filed on April 3, 1973.

DATED: May 25, 1973.

WILLIAM D. KELLER
United States Attorney
CHARLES H. MAGNUSON
Assistant United States Attorney
Chief, Tax Division
MASON C. LEWIS
Assistant United States Attorney

/s/ Charles H. Magnuson
CHARLES H. MAGNUSON
Attorneys for United States of America

SUPREME COURT OF THE UNITED STATES

No. 74-958

UNITED STATES, ET AL., PETITIONERS

v.

MAX JANIS

ORDER ALLOWING CERTIORARI

Filed June 9, 1975

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 588331 3